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Supreme Court of the United States

OCTOBER TERM, 1945

No. 183

HENRY W. GRUNEWALD, PETITIONER,

vs.

UNITED STATES OF AMERICA

No. 184

MAX MALPHRUS, PETITIONER,

vs.

UNITED STATES OF AMERICA

No. 185

[illegible] A. DIXON, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONS FOR CERTIORARI FILED JUNE 28, 1945

CERTIORARI GRANTED OCTOBER 15, 1945

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 183

HENRY W. GRUNEWALD, PETITIONER,

vs.

UNITED STATES OF AMERICA

No. 184

MAX HALPERIN, PETITIONER,

vs.

UNITED STATES OF AMERICA

No. 186

DANIEL A. BOLICH, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee

against

HENRY W. GRUNEWALD, Appellant, DANIEL A. BOLICH, Appellant, MAX STEINBERG, HARRY T. SCHERM, MAX HALPERN, Appellant, MILTON HOFFMAN, IRVING DAVIS and SAMUEL SCHOPICK

Appendix of Appellants Grunewald and Halperin

SUMMARY STATEMENT OF PROCEEDINGS BELOW

The indictment, containing seven counts, was filed October 25, 1954. All defendants pleaded not guilty. Trial was severed as to defendants Hoffman, Davis, and Schopick. Motions to dismiss and for other relief, prior to trial, were, in substance, denied, except that count 4 was dismissed on consent upon the Government's admission that the Statute of Limitations had run. Trial commenced February 7, 1955 before Judge Dawson and continued to and including March 28, 1955. At the close of the Government's case, defendants' motions for judgment were granted as to counts 3, 5, 6 and 7, except in the case of defendant Halperin, whose motion was granted only as to count 3.

The jury on March 28, 1955 convicted Grunewald on count 1 (conspiracy); Bolich on counts 1 and 2 (conspiracy); and Halperin on counts 1, 5, 6 and 7 (the last three covering attempts to influence witnesses); the jury acquitted the defendants Steinberg and Scherm.

On April 1, 1955, Grunewald was sentenced to 5 years and $10,000 fine; Halperin to 5 years and $5,000 fine on [fol. 2] the first count and 2 years and $1,000 fine on each of counts 5, 6 and 7, the prison sentences to run concurrently.

The Trial Court granted bail pending appeal. Appeal was taken by defendant Grunewald on April 1, 1955 and by defendant Halperin on April 5, 1955.

In United States District Court,
Southern District of New York

Index No. C145/249. No. 60,023.

United States of America

v.

Henry W. Grunewald, Defendant

Judgment and Commitment—April 1, 1955

On this 1st day of April, 1955 came the attorney for the government and the defendant appeared in person and by counsel.

It is adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury of the offense of conspiracy to defraud the U. S. in the exercise of its governmental functions of administering the Internal Revenue Laws and of detecting and prosecuting violations thereof, and of the faithful services of employees of Internal Revenue Service T 18 Sec. 371, U. S. C. as charged in count one and the court having asked the defendant whether he has anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

[fol. 3] It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five Years and fined $10,000 on count one. Defendant not ordered to stand committed for non-payment of fine. Bail continued subject to condition that appeal should be taken within 15 days, otherwise Government may move to have defendant remanded.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

(S.) A. O. Dawson, United States District Judge.

In United States District Court,
Southern District of New York

Index No. C145/249. No. 60,024.

United States of America

v.

Max Halperin, Defendant

Judgment and Commitment—April 1, 1955

On this 1st day of April, 1955 came the attorney for the government and the defendant appeared in person and by counsel.

It is adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a [fol. 4] jury of the offense of conspiracy to defraud the U. S. in the exercise of its governmental functions of administering the Internal Revenue Laws and of detecting and prosecuting violations thereof and of the faithful services of the employees of the Internal Revenue Service; corruptly endeavor to influence witnesses before Federal Grand Juries and in a District Court of the United States. T. 18 Sec. 371 USC—T. 18 Sec. 1503 and 2 USC as charged in counts 1, 5, 6, and 7, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five Years and fined $5,000 on count one. Two Years on each of counts 5, 6, 7 to run concurrently with sentence on count one, and fined $1,000 on each of counts 5-6-7. Defendant not ordered to stand committed for non-payment of fines on counts 1-5-6-7. Bail continued subject to conditions that appeal should be taken within 15 days otherwise Government may move to have defendant remanded.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Mar-

shal or other qualified officer and that the copy serve as the commitment of the defendant.

(S.) A. O. Dawson, United States District Judge.

[fol. 5] IN UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

No. C145-249.

UNITED STATES OF AMERICA,

v.

HENRY W. GRUNEWALD, DANIEL A. BOLICH, MAX STEINBERG, HARRY T. SCHERM, MAX HALPERIN, MILTON HOFFMAN, IRVING DAVIS and SAMUEL SCHOPICK, Defendants

INDICTMENT—Filed October 25, 1954

The Grand Jury charges:

1. From on or about January 1, 1946, and continuously and at all times thereafter up to and including the date of this indictment, HENRY W. GRUNEWALD, DANIEL A. BOLICH, MAX STEINBERG, HARRY T. SCHERM and MAX HALPERIN, hereinafter referred to as the defendants, in the Southern District of New York, did wilfully, knowingly, unlawfully and feloniously conspire, combine, confederate and agree together, each with the other, and with Milton Hoffman, Irving Davis, Samuel Schopick, Louis M. Berman, Philip Berman, Morton Marks, James A. Zipser, Samuel Cohen, Marjorie Zipser Segel, and Maurice Smith, named as co-conspirators but not indicted herein, and with divers other persons to the Grand Jury unknown, to defraud the United States in the exercise of its governmental functions of administering the internal revenue laws and of detecting and prosecuting violations of the internal revenue laws free [fol. 6] from bribery, unlawful impairment, obstruction, improper influence, dishonesty, fraud and corruption, and in its right and interest in the conscientious, honest and faithful services, judgments, determinations, and actions of the defendants DANIEL A. BOLICH, MAX STEINBERG, and

HARRY T. SCHERM, and duly appointed employees of the Bureau of Internal Revenue and the Internal Revenue Service of the United States Treasury Department, (said Bureau and Service hereinafter referred to as the Bureau), free from bribery, corruption, improper influence, dishonesty, bias, hope of unlawful reward and fraud, and to commit certain offenses against the United States, to wit, corruptly to endeavor to influence, intimidate, and impede witnesses in a court of the United States, to wit, witnesses in the District Court of the United States for the Eastern District of New York, and the Grand Jury thereof, and corruptly to influence, obstruct, and impede the due administration of justice therein, in violation of Title 18, United States Code, Section 1503; and corruptly to endeavor to influence, intimidate, and impede witnesses in connection with an inquiry and investigation being had by a committee of a House of the Congress, to wit, witnesses before the Committee on Ways and Means of the United States House of Representatives, and corruptly to influence, obstruct, and impede the due and proper exercise of the power of inquiry under which said inquiry and investigation was being had by said committee, in violation of Title 18, United States Code, Section 1505; and to commit perjury in violation of Title 18, United States Code, Section 1621.

2. During the course of the conspiracy, defendant MAX STEINBERG was a Revenue Agent and Group Chief in the office of the Revenue Agent in Charge, Upper New York Division, of the aforesaid Bureau.

3. During the course of the conspiracy, defendant DANIEL A. BOLICH was a Special Agent in Charge, Intelligence Unit, New York Division, of the aforesaid Bureau, and Assistant Commissioner of Internal Revenue.

[fol. 7] 4. During the course of the conspiracy, defendant HARRY T. SCHERM was an Internal Revenue Agent, an Acting Group Chief, and Group Chief, in the office of the Revenue Agent in Charge, Upper New York Division, of the aforesaid Bureau.

5. During the course of the conspiracy, a Grand Jury of the District Court of the Eastern District of New York, a competent tribunal, hereinafter referred to as the Brooklyn Grand Jury, instituted an injuiry and investigation, into possible violations within said district, of the internal reve-

nue laws of the United States, and into possible violations of law within said district in the administration and enforcement of the internal revenue laws and in the administration of the affairs of said Bureau. Said inquiry and investigation was a case in which a law of the United States authorized an oath to be administered.

6. During the course of the conspiracy, the Committee on Ways and Means of the United States House of Representatives acting by and through its Subcommittee on Administration of the internal revenue laws, a competent tribunal, was conducting an inquiry and investigation, for the purpose of determining whether or not the safeguards concerning the selection, promotion, and conduct in office of officials charged by law with the duty of administering the internal revenue laws were adequate to insure honest, competent and undivided service. Said inquiry and investigation was a case in which a law of the United States authorized an oath to be administered.

7. It was a part of the conspiracy that the defendants and co-conspirators would make continuing efforts to avoid detection and prosecution by any governmental body, executive, legislative and judicial, of tax frauds perpetrated by the defendants and co-conspirators, through the use of any means whatsoever, including but not limited to, bribery, improper influence and corruption of government employees, the giving of false testimony, the influencing, intimi- [fol. 8] dating and impeding of prospective witnesses to refrain from disclosing the true facts, obstruction of justice, and the presentation of false and fraudulent affidavits, statements and documents to the aforesaid Bureau.

8. It was further a part of the conspiracy that the defendants and co-conspirators, Irving Davis, Milton Hoffman and Samuel Schopick, would represent and cause to be represented to various persons that they and the law firm of Schopick & Davis were specialists in income tax matters and that they had connections and influence with the Bureau of Internal Revenue in New York City and Washington, D. C., and could obtain for taxpayers special advantages and preferential treatment and consideration from said Bureau and were able to influence officers and employees of the Bureau of Internal Revenue to make favorable dis-

positions of tax matters pending within the said Bureau, regardless of the merits thereof.

9. It was further a part of the conspiracy that the defendants MAX STEINBERG and HARRY T. SCHERM would use their positions as officers and employees of the Bureau of Internal Revenue to impress upon various persons the connections and ability of the law firm of Schopick & Davis to procure favorable dispositions of tax matters pending within the said Bureau, regardless of the merits thereof.

10. It was further a part of the conspiracy that the defendants and co-conspirators Irving Davis, Milton Hoffman and Samuel Schopick would obtain sums of money to procure corrupt dispositions of tax matters then pending within the said Bureau.

11. It was further a part of the conspiracy that the defendants DANIEL A. BOLICH, MAX STEINBERG and HARRY T. SCHERM, in their capacities as officers and employees of the said Bureau, would corruptly render decisions and corruptly take actions with respect to matters, investigations and criminal proceedings pending before the said [fol. 9] defendants in their official capacities and within the said Bureau.

12. It was further a part of the conspiracy that the defendants and co-conspirators would make and cause to be made false and fraudulent affidavits, claims, documents, statements and depositions and cause the same to be presented to the Bureau of Internal Revenue in connection with tax matters then pending within the said Bureau.

13. It was further a part of the conspiracy that the defendants and co-conspirators at all times would misrepresent, conceal and hide and cause to be misrepresented, concealed and hidden, the acts done pursuant to and the purposes of said conspiracy.

14. It was further a part of the conspiracy that the defendants and co-conspirators would misrepresent, and conceal and cause to be misrepresented and concealed the acts done pursuant to the conspiracy and the true nature of the conspiracy by any means whatsoever, including but not limited to, the influencing, intimidating and impeding of prospective witnesses to refrain from disclosing the true facts, obstruction of justice, bribery, and the giving of false testimony whenever and wherever it was sought by any

governmental body, executive, legislative and judicial, to detect and prove the existence of the conspiracy.

OVERT ACTS

The Grand Jury further charges that the defendants and co-conspirators, in furtherance of and for the purpose of carrying into execution said combination, conspiracy, confederation and agreement, did and performed the following and other overt acts, to wit:

1. On or about October 29, 1948, at 535 Fifth Avenue, New York City, in the Southern District of New York, co-conspirators Morton Marks and James A. Zipser delivered to co-conspirators Irving Davis and Milton Hoffman $100,000.00 in United States currency.

[fol. 10] 2. On or about January 12, 1949, in the City of Washington, District of Columbia, the exact place to the Grand Jury unknown, defendant MAX HALPERIN delivered to defendant HENRY W. GRUNEWALD $100,000.00 in United States currency.

3. On or about September 15, 1948, at 535 Fifth Avenue, New York City, in the Southern District of New York, co-conspirator Louis M. Berman handed a package containing $47,500 in United States currency to co-conspirator Irving Davis and defendant Max Halperin.

4. On or about September 27, 1948, at 535 Fifth Avenue, New York City, in the Southern District of New York, co-conspirators, Louis M. Berman and Philip Berman, handed $12,500 in United States currency to co-conspirator Irving Davis.

5. Sometime between October 27, 1948 and November 9, 1948, within the District of Columbia, the exact place to the Grand Jury unknown, defendant MAX HALPERIN delivered $60,000 in United States currency to defendant HENRY W. GRUNEWALD.

6. Sometime between January 12, 1949 and May 1, 1949, at 535 Fifth Avenue, in the Southern District of New York, co-conspirator, Irving Davis, delivered to defendant HARRY T. SCHERM $40,000.00 in United States currency.

7. On or about November 29, 1951, at 341 Ninth Avenue, New York City, in the Southern District of New York, defendant HARRY T. SCHERM submitted a "Financial State-

ment of Employee" to the Bureau of Internal Revenue of the Treasury Department of the United States.

8. On or about December 20, 1951, within the Southern District of New York, the exact place to the Grand Jury unknown, defendant DANIEL A. BOLICH had a telephone conversation with one Everett Harding.

9. On or about March 7, 1952, at 565 Fifth Avenue, New York City, in the Southern District of New York, co-conspirator Samuel Schopick had a conversation with co-conspirator Maurice Smith.

[fol. 11] 10. On or about March 12, 1952, in the Southern District of New York, the exact place to the Grand Jury unknown, defendants HENRY W. GRUNEWALD and MAX HALPERIN had a conversation.

11. Sometime between March 11, 1952, and March 31, 1952, in the Southern District of New York, the exact place and date being to the Grand Jury unknown, defendant MAX HALPERIN had a conversation with co-conspirator Louis M. Berman and one Monroe Tobias.

12. On or about August 26, 1952, in the Eastern District of New York, before the Brooklyn Grand Jury, defendant HENRY W. GRUNEWALD gave false testimony concerning his relations with the co-conspirators named herein. (Title 18, United States Code, Section 371.)

13. On or about April 7, 1954 in the Southern District of New York, defendant MAX STEINBERG testified falsely concerning his relations with the co-conspirators named herein.

Second Count

The Grand Jury further charges:

1. From on or about January 1, 1946, and continuously and at all times thereafter up to and including the date of this indictment, DANIEL A. BOLICH, MAX STEINBERG and HARRY T. SCHERM, hereinafter referred to as the defendants, in the Southern District of New York, did wilfully, knowingly, unlawfully and feloniously conspire, combine, confederate and agree together, each with the other, and with Henry W. Grunewald, Max Halperin, Milton Hoffman, Irving Davis, Samuel Schopick, Louis M. Berman, Philip Berman, Morton Marks, James A. Zipser, Samuel

Cohen, Marjorie Zipser Segel and Maurice Smith, named as co-conspirators but not indicted herein, and with divers other persons to the Grand Jury unknown, to defraud the United States in the exercise of its governmental functions of administering the internal revenue laws and of detecting and prosecuting violations of the internal revenue [fol. 12] laws free from bribery, unlawful impairment, obstruction, improper influence, dishonesty, fraud and corruption, and in its right and interest in the conscientious, honest and faithful services, judgments, determinations, and actions of the defendants as duly appointed employees of the Bureau of Internal Revenue and the Internal Revenue Service of the United States Treasury Department (said Bureau and Service hereinafter referred to as the Bureau), free from bribery, corruption, improper influence, dishonesty, bias, hope of unlawful reward and fraud.

2. During the course of the conspiracy, defendant MAX STEINBERG was an officer and agent of the Bureau of Internal Revenue of the Treasury Department of the United States duly appointed and acting under authority of the revenue laws of the United States, to wit, Revenue Agent and Group Chief in the office of the Revenue Agent in Charge, Upper New York Division, of the aforesaid Bureau.

3. During the course of the conspiracy, defendant DANIEL A. BOLICH was an officer and agent of the Bureau of Internal Revenue of the Treasury Department of the United States duly appointed and acting under authority of the revenue laws of the United States, to wit, Special Agent in Charge, Intelligence Unit, New York Division, of the aforesaid Bureau, and Assistant Commissioner of Internal Revenue.

4. During the course of the conspiracy, defendant HARRY T. SCHERM was an officer and agent of the Bureau of Internal Revenue of the Treasury Department of the United States duly appointed and acting under authority of the revenue laws of the United States, to wit, Revenue Agent, Acting Group Chief and a Group Chief in the office of the Revenue Agent in Charge, Upper New York Division of the aforesaid Bureau.

5. It was a part of the conspiracy that the defendants and co-conspirators would make continuing efforts to avoid [fol. 13] detection and prosecution by any governmental

body, executive, legislative and judicial, of tax frauds perpetrated by the defendants and co-conspirators, through the use of any means whatsoever, including, but not limited to bribery, improper influence and corruption of government employees, obstruction of justice, the giving of false testimony, the influencing, intimidating and impeding of prospective witnesses to refrain from disclosing the true facts, and the presentation of false and fraudulent affidavits, statements and documents to the aforesaid Bureau.

6. It was further a part of the conspiracy that the defendants and co-conspirators Irving Davis, Milton Hoffman and Samuel Schopick would represent and cause to be represented to various persons that they and the law firm of Schopick & Davis were specialists in income tax matters and that they had connections and influence with the Bureau of Internal Revenue in New York City and Washington, D. C., and could obtain for taxpayers special advantages and preferential treatment and consideration from said Bureau and were able to influence officers and employees of the Bureau of Internal Revenue to make favorable dispositions of tax matters pending within the said Bureau, regardless of the merits thereof.

7. It was further a part of the conspiracy that the defendants MAX STEINBERG and HARRY T. SCHERM would use their positions as officers and employees of the Bureau of Internal Revenue to impress upon various persons the connections and ability of the law firm of Schopick & Davis to procure favorable dispositions of tax matters pending within the said Bureau, regardless of the merits thereof.

8. It was further a part of the conspiracy that the defendants and co-conspirators Henry W. Grunewald, Max Halperin, Irving Davis, Milton Hoffman and Samuel Schopick would obtain sums of money to procure corrupt dispositions of tax matters then pending within the said Bureau.

[fol. 14] 9. It was further a part of the conspiracy that the defendant, in their capacities as officers and employees of the said Bureau, would corruptly render decisions and corruptly take actions with respect to matters, investigations and criminal proceedings pending before the said defendants in their official capacities and within the said Bureau.

10. It was further a part of the conspiracy that the defendants and co-conspirators would make and cause to be made false and fraudulent affidavits, claims, documents, statements and depositions and cause the same to be presented to the Bureau of Internal Revenue in connection with tax matters then pending within the said Bureau.

11. It was further a part of the conspiracy that the defendants and co-conspirators at all times would misrepresent, conceal and hide and cause to be misrepresented, concealed and hidden, the acts done pursuant to and the purposes of said conspiracy.

12. It was further a part of the conspiracy that the defendants and co-conspirators would misrepresent and conceal and cause to be misrepresented and concealed the acts done pursuant to the conspiracy and the true nature of the conspiracy by any means whatsoever, including but not limited to, the influencing, intimidating and impeding of prospective witnesses to refrain from disclosing the true facts, obstruction of justice, bribery, and the giving of false testimony whenever and wherever it was sought by any governmental body, executive, legislative and judicial, to detect and prove the existence of the conspiracy. (Title 26, United States Codes, Sections 4047(e) (4)).

Third Count

The Grand Jury further charges:

On or about January 5, 1949, in the Southern District of New York, HENRY W. GRUNEWALD, MAX HALPERIN and DANIEL A. BOLICH, the defendants herein, the latter being [fol. 15] then and there a duly appointed Internal Revenue Officer and agent of the Bureau of Internal Revenue of the Treasury Department of the United States, to wit, Assistant Commissioner of Internal Revenue, and then and there acting under authority of the revenue laws of the United States, did make opportunity for Samuel Schopick, Irving Davis, Milton Hoffman, Morton Marks, James A. Zipser, Marjorie Zipser Segel, and Samuel Cohen, to defraud the United States in the exercise of its governmental functions of administering the internal revenue laws and of detecting and prosecuting violations of the internal revenue laws free from bribery, unlawful impairment, obstruction, dishon-

esty, corruption and fraud, and in its right to and interest in the conscientious, honest and faithful services, judgments, determinations and actions of the defendant, DANIEL A. BOLICH, as a duly appointed Assistant Commissioner of Internal Revenue of the Bureau of Internal Revenue of the Treasury Department of the United States, free from bribery, corruption, improper influence, dishonesty, bias, hope *and* unlawful reward, and fraud, in that the said defendant DANIEL A. BOLICH, acting as Assistant Commissioner of Internal Revenue, did corruptly order, direct and require that an investigation into the criminal responsibility under the revenue laws of the United States of Morton Marks, James A. Zipser, Marjorie Zipser Segel, Samuel Cohen and Pattullo Modes, Inc., then pending within the said Bureau be terminated. (Title 26, U. S. Code, Section 4047(e) (5); Title 18, U. S. Code, Section 2.)

Fourth Count

The Grand Jury further charges that on or about November 4, 1948, in the Southern District of New York, HENRY W. GRUNEWALD, DANIEL A. BOLICH, MAX STEINBERG, MAX HALPERIN, MILTON HOFFMAN, IRVING DAVIS, and SAMUEL SCHOPICK, hereinafter called the defendants, under and in connection with a matter arising under the internal revenue laws of the United States, did wilfully and knowingly aid and assist in, and procure, counsel and advise the prepara-
[fol. 16] tion and presentation to the Intelligence Unit, New York Division, Bureau of Internal Revenue, New York City, of a false and fraudulent affidavit by one Maurice Smith, in which affidavit it was represented that, on or about February 20, 1947, or not more than a few days thereafter, said Maurice Smith, acting as the accountant for and representative of Pattullo Modes, Inc., a corporation and Morton Marks, Marjorie Segel, James A. Zipser, Samuel Cohen, and Lillian Bellet (hereinafter referred to as the taxpayers), and represented and disclosed to Revenue Agent Harry T. Scherm that the taxpayers had not reported the full income of said taxpayers; that said taxpayers had instructed and authorized said Maurice Smith as their representative to disclose and report the fact of said unreported income to the Bureau of Internal Revenue;

and that said Smith, on behalf of said taxpayers and for the purpose of supplying the Bureau of Internal Revenue with correct information and figures regarding the incomes of said taxpayers, was and had been working to compile detailed information and exact figures relating thereto, whereas, in truth and in fact as defendants well knew, said taxpayers had not authorized or directed said Maurice Smith to make any disclosures whatever to the Bureau of Internal Revenue or to said Revenue Agent Harry T. Scherm, said Maurice Smith was not and had not been working to compile detailed information and exact figures as to unreported income of said taxpayers or any of them, and said Maurice Smith did not have, on or about February 20, 1947, or at any other time, any such conversation with Revenue Agent Harry T. Scherm or any other representative of the Bureau of Internal Revenue as that described in said affidavit (26 U.S.C. 3793(b)).

Fifth Count

The Grand Jury further charges that on or about March 10, 1952, at New York City, in the Southern District of New York, HENRY W. GRUNEWALD, DANIEL A. BOLICH, MAX [fol. 17] STEINBERG, HARRY T. SCHERM, MAX HALPERIN, MILTON HOFFMAN, IRVING DAVIS and SAMUEL SCHOPICK, hereinafter called the defendants, well knowing that a grand jury of the District Court and the Eastern District of New York, hereinafter referred to as the Brooklyn Grand Jury, was duly conducting an inquiry and investigation, and well knowing that Morton Marks had been subpoenaed by, and was about to be a witness before, said Brooklyn Grand Jury with respect to material matters under inquiry as aforesaid, did unlawfully, wilfully, knowingly and corruptly endeavor to influence, intimidate and impede said witness, and did unlawfully, wilfully, knowingly and corruptly endeavor to influence, obstruct and impede the due administration of justice in the aforesaid District Court by counseling, requesting, advising and suggesting to said witness that he give fictitious, fraudulent, false and manufactured testimony before said Brooklyn Grand Jury concerning the facts and circumstances under which a certain income tax fraud investigation theretofore

instituted and conducted by the Bureau of Internal Revenue, involving said Morton Marks and others, had been abandoned, without a recommendation for a criminal prosecution, and concerning the acts and conduct of the defendants therein, all of which was material to the inquiry and investigation being conducted by said Brooklyn Grand Jury; and that he refuse to answer pertinent questions and refuse to tell the whole truth to said Brooklyn Grand Jury concerning said matters (18 U.S.C. 1503 and 2).

Sixth Count

The Grand Jury further charges that on or about March 15, 1952, at New York City in the Southern District of New York, HENRY W. GRUNEWALD, DANIEL A. BOLICH, MAX STEINBERG, HARRY T. SCHERM, MAX HALPERIN, MILTON HOFFMAN, IRVING DAVIS and SAMUEL SCHOPICK, hereinafter called the defendants, well knowing that a Grand Jury of the District Court of the Eastern District of New York, [fol. 18] hereinafter referred to as the Brooklyn Grand Jury, was duly conducting an inquiry and investigation and well knowing that Louis M. Berman and Monroe Tobias were about to be subpoenaed by, and expected to be witnesses before, said Brooklyn Grand Jury with respect to material matters under inquiry as aforesaid, did unlawfully, wilfully, knowingly and corruptly endeavor to influence, intimidate and impede said witnesses, and did unlawfully, wilfully, knowingly and corruptly endeavor to influence, obstruct and impede the due administration of justice in the aforesaid District Court by counseling, requesting, advising and suggesting to said witnesses that they give fictitious, fraudulent, false and manufactured testimony before said Brooklyn Grand Jury concerning the facts and circumstances under which a certain income tax fraud investigation there-fore instituted and conducted by the Bureau of Internal Revenue and involving said Louis M. Berman and others, had been abandoned without a recommendation for a criminal prosecution, and concerning the acts and conduct of the defendants therein, all of which was material to the inquiry and investigation being conducted by said Brooklyn Grand Jury, and that they refuse to answer pertinent questions and refuse to tell the whole

truth to said Brooklyn Grand Jury concerning said matters (18 U. S. C. 1503 and 2).

Seventh Count

The Grand Jury further charges that on or about March 18, 1952, at New York City, in the Southern District of New York, HENRY W. GRUNEWALD, DANIEL A. BOLICH, MAX STEINBERG, HARRY T. SCHERM, MAX HALPERIN, MILTON HOFFMAN, IRVING DAVIS and SAMUEL SCHOPICK, hereinafter called the defendants, well knowing that a grand jury of the District Court of the Eastern District of New York, hereinafter referred to as the Brooklyn Grand Jury, was duly conducting an inquiry and investigation, and well knowing [fol. 19] that Louis M. Berman and Monroe Tobias were about to be subpoenaed by, and expected to be witnesses before, said Brooklyn Grand Jury with respect to material matters under inquiry as aforesaid, did unlawfully, wilfully, knowingly and corruptly endeavor to influence, intimidate and impede said witnesses, and did unlawfully, wilfully, knowingly and corruptly endeavor to influence, obstruct and impede the due administration of justice in the aforesaid District Court by counseling, requesting, advising and suggesting to said witnesses that they give fictitious, fraudulent, false and manufactured testimony before said Brooklyn Grand Jury concerning the facts and circumstances under which a certain income tax fraud investigation theretofore instituted and conducted by the Bureau of Internal Revenue and involving said Louis M. Berman and others, had been abandoned without a recommendation for a criminal prosecution, and concerning the acts and conduct of the defendants therein, all of which was material to the inquiry and investigation being conducted by said Brooklyn Grand Jury, and that they refuse to answer pertinent questions and refuse to tell the whole truth to said Brooklyn Grand Jury concerning said matters (Title 18, Sections 1503 and 2, United States Code).

J. Edward Lumbard, United States Attorney

_____, Foreman.

[fol. 20] IN UNITED STATES DISTRICT COURT

Excerpts of Testimony

MORTON MARKS, called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

'Direct examination.

By Mr. McMahon:

Q. Will you state your full name, sir?
A. Morton Marks.
Q. Where do you live, Mr. Marks?
A. 22 Sunset Road, Lawrence, New York.
Q. What do you do?
A. I am a salesman at Pattullo Modes.
Q. How long have you been with Pattullo Modes?
A. About thirty years.
Q. Are you also a stockholder in Pattullo Modes?
A. I am.
Q. How much stock do you own at Pattullo Modes?
A. About 19 per cent.
Q. Was that true in the year 1947?
A. That is right.
Q. Who were the other stockholders in 1947, and what were their percentages of stock?
A. Marjorie Segel, 25½ per cent; James Zipser, 25½ per cent; Sam Cohen, 30 per cent; and Lillian Bellet, 8 per cent.
Q. Did there come a time when Lillian Bellet disposed of her stock?
A. Yes. I purchased then the 8 shares of her stock, when she retired in the middle of 1946.
Q. Is there also an issue of preferred stock in Pattullo Modes?
A. There is.
Q. Who owns that?
A. It is owned by Marjorie Segel and James Zipser.
Q. Are you also an officer of Pattulo Modes?
A. I am.
Q. What office do you hold?

A. Secretary of the corporation.

Q. Did you hold that in 1946, 1947, 1948 and 1949?

A. That is right.

Q. Were you in the Pattullo Modes Company in the years 1942 through 1946?

A. Yes, sir.

[fol. 21] Q. What is the business of the Pattullo Modes Company?

A. We manufacture dresses, suits and coats.

Q. What is the price line of the goods you manufacture?

A. Starting about $50 and going up to $200 wholesale.

Q. Did there come a time in 1947 when you had some difficulties with the Internal Revenue Bureau about your income taxes, Pattullo Modes' income taxes and your individual income taxes?

A. Well, early in 1947 we had the usual audit of our books for the previous years by the Revenue Department, and they disallowed a small portion of our travel and entertainment expenses.

Q. What did you do with respect to that disallowance?

A. We said it was O. K., and we waited for our additional tax bill on it.

Q. Did there come any further occurrences with respect to that?

A. Yes, a little later, possibly a month or six weeks, maybe two months, Mr. Smith, our accountant, informed us that the revenue agent was going to disallow a great deal more of the traveling and expense accounts, that we would have to pay a much larger tax than he had originally decided upon.

Q. Did you agree to that?

A. I agreed to that.

Q. Did there come any further conversations with Smith with respect to your income tax problems?

A. Yes, several months after that, along towards about May, Mr. Smith came to me, to our showrooms, and said, "Morton, have you been selling dresses to Loehmann's without putting those sales on the books?"

I said, "Yes."

He said, "You are in a great deal of trouble. You may as well drop out of the window."

Q. Did Mr. Smith tell you how he had learned about this?

A. He said Mr. Scherm had called him and told him that they had found this out from the examination of Loehmann's books.

Q. At the time of the first audit, do you recall who the agent was who made that first audit?

A. Mr. Scherm.

[fol. 22] Q. Now, coming back to the conversation you had with Mr. Smith where he told you that Scherm had learned that you had made off-the-record sales to Loehmann's, was it the fact that you had made such off-the-record sales to Loehmann's?

A. It was.

Q. How long had you been doing that?

A. About five years.

Q. And how would you handle those transactions?

A. Well, Loehmann buyers would come in and we would sell them a lot of dresses, and they would give us a check for the amount, or a check would be forthcoming in a day or two. We handled those checks in two manners: one way, in one manner we wouldn't put the sales on the books, but deposited the checks in the regular Pattullo account and at our next payroll drawing we would increase the payroll by the amount of the Loehmann sales. After the payroll money was deducted from the amount, that was given to me and I put it in a safe deposit box.

Q. You would draw the money out of the bank, is that right?

A. That is right, with the payroll money, and then take it in that way from the bookkeeper and I would put it in a safe deposit box. The other way, a check was drawn—the check was cashed at the bank without going through the books.

Q. What did you do with that cash?

A. I did the same thing. I put it in the safe deposit box.

Q. Now, did you make any record of the dresses you sold to Loehmann's on the corporate books?

A. No, sir.

Q. After you put this money in the safe deposit box what did you do with it among yourselves?

A. Well, every once in a while we would divide up the amount we had in the box somewhat in the proportion that we owned the stock.

Q. Were all the stockholders in on this arrangement?

A. Yes, they were.

Q. Now, did you report these off-the-record sales and the cash you received from them in your income tax returns during that period?

A. We did not.

[fol. 23] Q. Did you know you hadn't reported them?

A. Yes, sir.

Q. You did it deliberately?

A. Yes, sir.

Q. Falsely?

A. Yes, sir.

Q. And fraudulently?

A. Yes, sir.

Q. Now, did you have a partner or was there a Jo Copeland connected with your business?

A. Yes, sir.

Q. What was her relationship to Pattullo Modes?

A. She was our designer.

Q. What was her arrangement for compensation?

A. She had a stipulated salary and a percentage of the profits agreement with us.

Q. Did she know about these off-the-record sales?

A. No, she did not.

Q. Did you conceal them from her?

A. We did.

Q. Did she know you took this money and did not disclose it to her?

A. She did not.

Q. Now, Mr. Marks, have certain promises been made to you by the Government with respect to your testimony?

A. Yes, they have.

Q. Will you state what those are?

Mr. Singer: I object to that on the ground, first, that nobody, as far as I have been able to determine from the law, has the power in the United States in a case of this kind to make any promises which are binding on the Court, and, second upon the ground that this testimony is an attempt to discredit his own witness.

The Court: Objection overrulled.

Q. Go ahead, Mr. Marks.

A. Yes. We were promised immunity from prosecution. We were promised they would not prosecute us criminally for anything we might have done in our tax evasion and events leading up to the discovery if we told the Government the truth about it.

Q. Now, back in this period 1942 to 1946 had you also done anything with respect to your travel and entertain [fol. 24] ment expense?

A. Yes. We were jacking up the travel and entertainment accounts higher than they were and also using this money, dividing this money among ourselves in the same manner.

Q. Did you take these false expense deductions on your income tax?

A. We did.

Q. Now, did you make any retail sales during that period?

A. Very few. We must have made some but it didn't amount to a great deal.

Q. When you did make them how did you handle those?

A. In the same manner as the Loehmann's sales.

Q. That is, you took cash for the sale?

A. Took cash for the sale and did not put it on the books and divided that money with the Loehmann—when we divided the Loehmann's money.

Q. Did you report that on your income tax?

A. No, sir.

Q. Coming back to this conversation when Smith told you you might as well jump out the window, will you place that a little more definitely in time?

A. I would say it was towards the middle of May of 1947; maybe the latter part of May.

Q. Now, did you have a conversation, after you had learned it from Smith, with the other principals of your company?

A. Yes.

Q. Will you state what that conversation was, and whom you talked with.

A. Well, I talked to Mr. Cohen and Mrs. Segel about it.

and we realized we were in quite a jam. I don't remember the exact words.

Q. What did you decide to do about it?

A. Well, we just decided to do nothing. We just decided to sit back and see what happened.

Q. Now, what is the next event you remember with respect to your tax problems?

A. A Mr. Katz came up to see me about this time, came up into our showroom and asked me—he showed me a paper with the initials M. S. on it and asked me if I knew who it was. I told him I did not, but he said our accountant [fol. 25] would; that if we were in tax difficulties this man could help us. I showed the paper with the initials M. S. on it to Mr. Smith. He identified the initials as standing for Max Steinberg.

Q. Did he tell you who Max Steinberg was?

A. He told me Max Steinberg was the Chief in the Internal Revenue Department. I made an appointment with Mr. Smith to meet at Mr. Katz' office with this gentleman. He gave Mr. Katz the information——

Q. Let me understand that; Was that an appointment for Mr. Smith or for you?

A. For Smith to go over to meet with this man.

Q. Did Smith report to you later about that conference?

A. Yes. Mr. Smith told me that he went to Mr. Katz' office where he met a Mr. Deutsch. Mr. Katz introduced him to Mr. Deutsch, and after a brief conversation he went over with Mr. Deutsch to the offices of Schopick & Davis.

Q. Did he tell you what had occurred at the office of Schopick & Davis and whom he had seen there?

A. Yes. He saw Mr. Davis and Mr. Hoffman who he said were acquainted with a great deal of the particulars of our tax problem and that Mr. Hoffman seemed to be friendly with the people in the Department where our tax problem was at that time, and he thought they could be of help to us in the settlement of this problem.

Q. Did you have any conversation with Smith a few days after that?

A. Yes. He had again seen Mr. Hoffman and Mr. Hoffman had taken him to Mr. Steinberg's house to meet Mr.

Steinberg. Mr. Smith told me that he met Mr. Steinberg and Mr. Steinberg seemed to be very friendly with Mr. Hoffman. As a matter of fact, there was a big party that Mr. Steinberg was giving for his daughter, either an engagement or a wedding party, and Mr. Hoffman was invited to it.

Q. Did Smith say whether he had talked to Steinberg?

A. Yes, he did.

Q. Did he tell you what that conversation was?

A. No, the conversation I don't remember.

[fol. 26] Q. Now, did you yourself go to see Schopick and Davis?

A. Mrs. Segel and I went over to Schopick & Davis' office where we met with Mr. Davis and Mr. Hoffman. We met Mr. Schopick—we were introduced to him and then he left the room and we discussed our problem with both of them.

Q. Tell us what the conversation was and whom you talked to.

A. He told us that they knew all about our case, they knew about the Loehmann's sales. We discussed it with Mr. Hoffman and Mr. Davis; that they knew about the Loehmann sales and impressed upon us the fact that they were friendly with the people who were handling our case; that they thought they could be of great help to us. They also told us we were free to take any other lawyers we wanted, but they were the only ones who could keep us out of jail. They requested payment——

Q. Did they say anything to you about whether the government knew about these off-the-record sales?

A. Well, I assume——

Q. No, not what you assume, Mr. Marks. Do you recall whether they said anything to you about whether the Government knew about these off-the-record sales?

The Court: By the Government you mean the Bureau of Internal Revenue?

Mr. McMahon: Yes.

A. Well, I had already known that they did. I don't remember them telling it to us direct.

Q. Now, was there any discussion about a fee at this time for Schopick & Davis?

A. Yes. Mr. Davis told us it would require a down payment or a retainer of $7,500. This would only be the first payment on it; there would be other payments that would have to be forthcoming depending upon what they could do for us.

Q. Now, do you recall about when this conversation took place with Schopick and Davis?

A. Very early in June. I think the date was June 9th.

Q. And did you pay them the fee of $7,500?

A. We did.

[fol. 27] Q. Now, did you discuss this case among yourselves, that is the principals of Pattullo Modes shortly after this time?

A. Well, we did talk among ourselves. Most of the discussion was between Mrs. Segel and myself, and we had repeated talks with Mr. Davis at his office and Mr. Hoffman regarding the case.

I remember coming back from their office one day and saying to Mrs. Siegel that this case was going to cost us a great deal of money and we better start accumulating some, because they were impressing us how friendly they were with the people, and by the way we got there I knew it was going, perhaps, to take some cash to settle this matter.

Q. Now, did you go about accumulating that cash?

A. We did.

Q. And how did you go about that?

A. Well, instead of selling it to people, to a store like Loehmann's, we started to increase our individual sales, sales to private people that were not in business. We would sell them some dresses, take the cash, not put it on our books, and put it away in the safe deposit box, and we also kept on increasing our travel and entertainment accounts to larger than they actually were.

Q. Now, did you report those moneys on your income tax returns in subsequent years?

A. No, sir, we did not.

Q. Where did you put this cash? Where was the safe deposit box?

A. The safe deposit box at the Bowery Savings Bank on 34th Street near Seventh Ave.

Q. Now, did you have any talks throughout the summer and fall of 1947 with Davis and Hoffman about the progress of the case?

A. Yes. We talked to them a number of times. We were becoming very impatient. We thought that the settlement by this time should be in sight, and we were getting nervous about it. Late that year, or early in January of 1948, Mr. Davis told us that because he wasn't making enough headway, he was employing——

[fol. 28] Q. Just a minute. Did he tell you where the case was in the Internal Revenue Bureau during this period?

A. They told us it was on Ninth Avenue.

Q. What did he say about that, if anything?

A. Well, we knew on Ninth Avenue was the place where civil claims were settled and not criminal claims.

Q. Did he tell you anything about Ninth Avenue?

A. No.

Q. Was anything said as to what he intended to do about Ninth Avenue or what he planned to do?

A. Well, he planned to keep the tax case there on Ninth Avenue, and he repeatedly told us it is still on Ninth Avenue, and that is the progress we are making, that it is still there, but in our anxiety for action, he told us that he engaged another firm of attorneys to assist him in this matter, the firm of Schwaeber & Saver.

Q. Now, did he say anything to you during these talks in the summer about how you were to conduct yourself about this?

A. Mr. Davis and Mr. Hoffman repeatedly told us that anything that they might say to us was for our ears only, we were not to talk to anybody about it, not to discuss it with our accountants, with their accountants who were in our offices, not to tell anything about it to our accountant, Mr. Smith.

Q. What was the name of the firm that Davis told you he had employed?

A. Schwaeber & Saver.

Q. What did he tell you about Schwaeber & Saver?

A. He told us they were competent, very competent tax

accountants and he thought they could help us in this matter.

Q. Tax accountants?

A. Tax attorneys.

Q. Did he tell you what their specialty was?

A. I don't remember.

Q. Well, did you retain Schwaeber & Saver?

A. Yes. We gave Mr.—we gave Schwaeber & Saver our powers of attorney.

[fol. 29] Q. About how long after did you give those powers after you had first seen them?

A. Well, Mr. Davis told us that he had employed them at the end of December or early in January, and an appointment was made sometime later for Mrs. Segel to go there and meet with Mr. Schwaeber, sometime after we had been advised that Schwaeber & Saver had been employed.

(Paper marked Government's Exhibit 5 for identification.)

Q. Mr. Marks, I show you Exhibit 5 for identification, and I ask you if you can tell me what that is and if that is your signature on it?

A. Well, this is a power of attorney that was given to Schwaeber & Saver.

* * * * * * *

Mr. MacMahon: If they have no objection to my refreshing the witness' recollection as to the date.

Mr. Singer: Oh, that is perfectly all right.

Mr. MacMahon: March 31, 1948.

Q. Now, after you had given this power of attorney did you have any further talks with Davis or Hoffman about the progress of your case?

A. Well, we continued prodding them and asking them for information about our case. Mrs. Segel was very nervous and upset, and we were getting nowhere, making no headway at all with the new attorneys in the settlement of the case.

Mr. Davis finally told us, this was about June, that he was dissatisfied with the progress that Schwaeber & Saver

were making and that he has just realized that he had a man in his office that could be of great help to us. He said, "Here he was under my nose all the time and I just didn't realize it."

[fol. 30] Q. This conversation was June of 1948?

A. That is right.

Q. What did he say about this man in his office?

A. He told me that this man was Mr. Halperin and he had a very good friend in Washington, an influential friend that he would like him to talk to about our case.

Q. What did you say about that?

A. We said fine. He said Mr. Halperin was going to Washington shortly, and I think about two weeks after that he told us——

Q. Just a minute. Did he tell you what the name of the man in Washington was?

A. No, sir.

Q. Did you talk to Mr. Halperin at that time?

A. I did.

Q. What did he say?

A. He said this man might be able to help us; he would like to go down and talk to him about the case.

Q. Did he tell you anything about this man?

A. No, sir.

Q. Did he tell you anything about his relationships with him?

A. He had known the man for a long time.

Mr. Singer: By "he" whom do you mean?

Q. Halperin.

A. He told us he had known the man for a very long time.

Q. What did you say when you told him it would be agreeable to you?

A. He said he would go down and talk to this man in Washington very shortly.

Q. Now, did you thereafter have any talk with Halperin about it?

A. Yes, sir. Upon his return from Washington Mr. Davis and Mr. Halperin informed Mrs. Seged and myself

that Mr. Halperin spoke to his friend and that his friend thought he could help us and would start working on it.

Q. Did he say what his friend would do in your behalf?

Mr. Singer: Whose friend?

Mr. MacMahon: He said he was having a conversation with Halperin and Davis.

[fol. 31] Mr. Singer: Who is "he"?

The Court: Identify who the "he" is, Mr. MacMahon.

The Witness: Mr. Davis said he was sure that Mr. Halperin's friend could bring our case to a favorable conclusion if he would undertake it, and as long as he promised to undertake it he feels a lot better about it.

Q. Was Mr. Halperin present during this conversation with Davis?

A. At that time, yes.

Q. Did he say anything about it, Halperin?

A. Merely that this man thought he could help us to bring it to a satisfactory conclusion for us and that he would start to work on it.

Q. Now, do you see Mr. Halperin in the courtroom?

A. Yes, I do.

Q. Will you point him out?

A. The gentleman standing (indicating).

Mr. MacMahon: May the record note that the witness has identified Mr. Halperin, Max Halperin.

The Court: So noted.

Q. Now, did you have any further talks with him about this Washington arrangement?

Mr. Singer: Who? You keep using the word "him."

The Court: Identify whether it was Halperin or Davis.

Mr. MacMahon: Let us find out first whether he had any talks; then we will develop whom they were with.

Q. Did you have any further talks this summer about this Washington arrangement, the summer of 1948?

[fol. 32] A. Yes. We had several talks with Mr. Halperin in that summer and he told us either that he had been to Washington and spoken to his friend and that his friend was working on it and he was making progress, or else he had just heard from him, and likewise.

Q. Now, at any time during this summer was there any discussion with Mr. Davis about circularization of the Pattullo customers?

A. Yes.

Q. Will you tell me what that was?

A. I think it was late in the summer of 1948 when Mr. Davis told Mrs. Segel and myself that it is the custom for the Internal Revenue to circularize our customers or accounts. Well, it was a great blow to us. We told him that that would hurt us, that it would destroy our credit if the trade got wind of it, and it also would hurt our standing with a great deal of our customers and might cost us our business. We asked him to do everything he could to stop it.

Q. What did he say?

A. For them to use some other method. He said he would work on it.

Q. This is the conversation with Davis. Go ahead, Mr. Marks.

A. And shortly after that he told us that because of his good influence with the proper people he was able to get them not to circularize our accounts.

Q. Now, did you have any further conversation about this Washington arrangement?

A. Well, we had a number of conversations about it, but there wasn't very much to say until about September.

Q. Now, what happened in September? Whom did you talk to and what about?

A. Mr. Davis told us, told Mr. Segel and myself that Mr. Halperin's friend in Washington would be able to achieve the results that we wanted to settle our case satisfactorily for us, but it would cost us a great deal of money in cash.

Q. Do you recall how much he mentioned?

A. He asked for $150,000.

Q. Now, who was present at this conversation?

A. I believe it was Mr. Hoffman and Mr. Davis, Mrs. Segel and myself.

[fol. 33] Q. Was Halperin there?

A. No.

Q. What did you say?

A. I told him we didn't have any kind of money like

that any of that kind of money in cash, that all we could do for him was to get him $50,000.

Q. Now, did he say anything about how you could raise this money?

A. Not at that time. We offered him the fifty and he said—he said that would be out of the question. He said they wanted something like $200,000 "and we got them down to 150." He said that would be silly.

Q. Did he say anything about your offer of $50,000?

A. He said it would be very, very silly. He said, "I will have to see what I can get them to do."

Q. Did he say whom he was going to talk to about it?

A. He was going to have Mr. Halperin talk to his friend to see what he could do.

Q. What he could do about what?

A. About reducing the figure, and then two weeks after that he told us they would take 125.

Mr. Singer: Who said?

Q. Two weeks after that did you have another meeting?

A. Two weeks after that Mr. Davis told Mrs. Segel and myself that Mr. Halperin returned from Washington and they would take $125,000.

Q. Was Halperin present at this time?

A. No.

Q. What did you say about that?

A. We told him that all we had was $70,000; we could probably raise three, four or five thousand dollars among ourselves to make it seventy five; that is the best we could do. He told us that wouldn't be satisfactory, and he said—I think there was a later date we offered them seventy-five, and that is all that we could do for him and he said that wouldn't be satisfactory.

A week or so later he told us that they would accept, and that would be their final word, $100,000.

[fol. 34] Q. Whom did he say when he said "they"?

A. He told that to Mrs. Segel and myself, told Mrs. Segel and myself that the man in Washington would take $100,000.

Q. Mr. Corbin asks who was it who was going to take the 100,000?

A. That the man in Washington would do it for $100,000.

Q. Would do what?

A. Would settle our case satisfactory to us.

Q. Was anything said about criminal prosecution?

A. Well, when I say was satisfactory to us, that is the ends we were seeking at that time, to settle this matter in a civil way without criminal prosecution, and Mr. Halperin went to Washington to see his friend to attain that result for us.

The Court: By civil do you mean paying any taxes but avoiding a criminal prosecution? Is that what you mean?

The Witness: That is right, your Honor.

Q. Was anything said about the manner in which you were to raise this $100,000?

A. Well, we told him that

Mr. Siniger: Told whom?

The Witness: We told Mr. Davis that all we had was $75,000 among ourselves. He said, "Well, you have got to raise the other twenty-five. That is their final word." He said, "If you can't get that, they will have to drop the matter." He says, "I have done all I could." He says, "Now, there is a possibility that some friends of yours—you are four people—you might each have a couple of friends that you could raise $5,000 in cash." He said, "I don't want you to sell any securities. I don't want you to draw any money out of the bank in cash." He says, "There can be no record of this money." He says, "I want you to borrow it from friends in that way." He says, "Try." Well, we did.

[fol. 35] Q. How did you raise the money?

A. I went to see Mr. Jacobs at the Waldorf-Astoria and asked him to lend me this money, and I would in turn let him hold $25,000 in negotiable Government Bonds. He could keep these bonds and clip coupons on it while we had the $25,000 until we repaid his $25,000 in cash, until we redeemed the bonds. He loaned us the money.

Q. Did he give you the loan in cash?

A. Yes.

Q. What did you do with that cash?

A. I took that money and put it in a safe deposit box at the Bowery Savings Bank and called Mr. Davis and told him we were trying to get it, we had got a little bit of it,

we hadn't got the twenty-five as yet, could he do something else about it, could he get the figure down a little more. He told us that was the last figure, that he couldn't do any more about it, that that was final. A few days after that, I told him we had raised the money and made an appointment to bring it over to his office. Mr. James Zipser and I went to the box, got the money, put it in a big red manilla envelope——

Q. Did you count the money?

A. Yes, sir.

Q. How much was there?

A. There was the $100,000, probably a little bit more than that.

Q. What were the denominations of the bills?

A. Well, we had been asked for the bills to be in twenties, tens and some fifties but nothing higher than that. Unfortunately, there were about $20,000 in hundred dollar bills among them too. And they had to be satisfied with that.

Q. What did you do with the money after you counted it?

A. We put it in this manilla envelope, this large manilla envelope, with cord around it or string or tape around it, and went by taxicab over to Schopick & Davis's office, where we met with Mr. Hoffman and Mr. Davis. We put it on the desk in their office in front of both of them and left.

Q. Was anything said about this money at the time you delivered it to them by either Davis or Hoffman?

[fol. 36] A. Mr. Davis told us that this money would be turned over to Mr. Halperin, who would keep it in New York until he got word from Washington, from his friend, that the result we wanted had been attained. He then would turn it over to his friend in Washington.

Q. Up to this time, had you heard the name of this friend in Washington?

A. No, sir.

Q. Did you have any discussion with Davis about how you would learn when you got this result?

A. Mr. Davis told us that we would never get anything written from the Government that our case was going to be settled in a civil manner. He says all he could promise us that there would be a memorandum put into our file that the case was to be settled on a civil basis.

Q. After you delivered the money, did you have any further talks with him about the progress of your case?

Before we come to that, are you able to place for me the time when you delivered this money?

A. The latter part of October 1948. Yes, a short time after that, early in November, maybe two weeks after the payment of the money, Mr. Davis told us that Mr. Halperin had learned that our case was going to be settled in a civil manner. We were very elated of course. He told us also that the Revenue Department was going to send in people to do an audit of our books, to keep our mouths shut about anything that had happened, not to talk to anybody, not to talk to even our accountant, Mr. Smith, about what had transpired and this money going to Washington.

Q. Did he say anything about talks with the agents of the Internal Revenue Bureau?

A. Yes, he told us to give them any records that they requested, and to refer all questions that they might ask us to him.

Q. Did those agents come on your premises?

A. Yes, Mr. Clayton and Mr. Scherm came in shortly after Mr. Davis had notified us that they would be there. They came into our office one morning, and I asked them [fol. 37] to wait until Mr. Davis had arrived and he would talk with them and find out what records they wanted, and we would supply them with it.

Q. Did they stay on your premises for some time?

A. Quite a while.

Q. What were the names of the agents?

A. Mr. Clayton and Mr. Scherm.

Q. What did they do there?

A. They audited our corporate books as well as our personal accounts. They also drew up a net worth statement for each of the individuals involved.

Q. Did you furnish such a statement?

A. I furnished such a statement.

Q. On your own personal financial situation?

A. That is right, sir.

Q. While these agents were on your premises, did you have any further talks with anyone about the progress of this case?

A. Mr. Davis had told us to cooperate with these agents, and shortly after that, he told us that we were to go down with him to Mr. Clayton's office at the special agents' building and give a statement to Mr. Clayton.

Q. Did you go down?

A. Yes, we all went down that morning——

Q. Just a minute. You say "we all." Who went down?

A. Mrs. Bellet, myself, Mr. Cohen, Mrs. Segel and Mr. Zipser went down to Mr. Clayton's office.

The Court: Where was his office?

The Witness: On lower Broadway.

Q. Who was present at the office other than the ones you have just mentioned?

A. Mr. Davis accompanied us, and we met only with Mr. Clayton. He interviewed each one of us individually and Mr. Davis told us to—he told me to give Mr. Clayton a statement of how we evaded taxes. Mr. Clayton took [fol. 38] this down in longhand, and I believe I signed it.

. . . . . .

Mr. Rosenblum: May we follow, and I assume we are following, what your Honor ruled on yesterday and this morning, that all questions which we claim are hearsay and outside the conspiracy we are deemed to object to and deemed to have an exception?

The Court: Yes. They are all taken subject to connection.

Mr. Rosenblum: That is right.

Mr. Singer: May we ask the witness to move forward as far as he can.

Q. Mr. Marks, we reached a point in your testimony where Mr. Davis had arranged a meeting for the principals of the Pattufo Modes to go down to Mr. Clayton's office. Now, before you went down there did you have any conversations with Davis about what you were to do down there?

A. Mr. Davis told us that everything had been taken care of in Washington as far as our case was concerned, we were not going to be prosecuted criminally, and we are to cooperate with the Government; that is one of the ways which we could show our cooperation, by giving them a statement of our activities in the tax evasion.

Q. The tax evasion for what period of time?

A. The period of 1942 to 1946.

Q. Now, was anything said about what you were to do with your subsequent tax evasion?

A. I don't recall whether he told us not to say anything about it, but he had said that to us before, that nobody is supposed to know anything about the money that went to Washington.

Q. Did he say anything about saying anything to Mr. Clayton about that money?

A. I don't recall him specifically saying about Mr. Clay- [fol. 39] ton; but nobody I think took in everybody.

Q. Now, you went to Clayton's office. Did you tell him anything about this money you paid to Davis and Halperin for the Washington man?

A. I did not.

Mr. Singer: I object to that. There isn't any such proof at all that he gave the money to Davis. What Davis told him——

The Court: I think you are right, Mr. Singer.

Q. Did you tell him anything about the money, Clayton?

A. No, sir.

Q. Did you tell him how you had raised the money?

A. No, sir.

Q. Did you tell him you had been jacking up your expense accounts during the period after 1946?

A. No, sir.

Q. Did you tell him you had been making these sales off the record during 1946?

A. No, sir.

Q. Did you tell him that Davis had told you he heard from Washington that there wasn't going to be any prosecution?

A. No, sir.

Mr. Corbin: I hadn't heard any such testimony before.

Mr. MacMahon: It is my recollection that he did so testify this morning.

The Court: The jury can recall whether there was any such testimony, but at least he didn't say any such thing to Mr. Clayton.

Mr. Singer: And I object to the district attorneys asking

a series of questions concerning statements which the witness did not make, where all he ought to be permitted to ask is what the witness said to Mr. Clayton, and not what he didn't say.

The Court: I will allow the question.

[fol. 40] Mr. Singer: I respectfully except.

Mr. Corbin: May I please have the time or approximate time of this visit to Clayton fixed?

The Court: Yes. Will you fix the time.

Mr. MacMahon: I will, your Honor.

Q. During this visit to Clayton, did you sign any statement?

A. I did.

The Court: When was the visit?

Mr. MacMahon: The statement will show, your Honor.

(Government's Exhibit 6 marked for identification.)

Q. Mr. Marks, before the agents came on your premises at Pattulo Modes sometime in November, what had Mr. Davis told you about why you were cooperating with them?

A. Mr. Davis told us that our case is going to be settled on a cooperative basis because of the fact that we were going to cooperate with the Government and supply them with as much facts and figures as we can.

Q. Did he say anything about whether it was going to be a civil or criminal case basis?

A. He told us it would be settled on a civil basis. He told us, before they came in, that it was going to be settled on a civil basis.

The Court: By a civil basis you mean paying the taxes they found to be due, but no criminal prosecution?

The Witness: That is right.

* * * * * *

Q. Now, following your signing of this statement on January 4, 1949, did you have any further talks with Mr. Saver, Mr. Hoffman, Mr. Halperin or any of those people?

A. Several days after signing our statement with Mr. Clayton, Mr. Davis informed us——

[fol. 41] Q. Whom did he inform?

A. He informed Mrs. Segel and myself and Mr. Cohen that we are going to hear officially that our case will be settled on a civil basis. He told us there was a meeting being arranged or arranged at Mr. Baradell's office, and Mr. Saver would represent us at this meeting. He said Mr. Saver was the attorney of record and he believed, Mr. Saver believed that he was the one that had got the no prosecution for us, and Mr. Davis said he wanted Mr. Saver to continue to believe that and he would represent us at this meeting with Mr. Baradell a few days after he advised us.

Q. Now, did you have a meeting with Mr. Baradell?

A. We did.

Q. Where was that?

A. At Mr. Baradell's office in the same building as Mr. Clayton's office.

Q. Now, who was present there?

A. Mr. Scherm, Mr. Clayton, Mr. Baradell, Mr. Davis, Mr. Cohen, Mrs. Segel, Mrs. Bellet and myself.

Q. What was said there?

A. Mr. Baradell told us that the case was going to be settled on a civil basis only, the Government was not going to prosecute us because of our splendid cooperation given to the Revenue Department. He said that we would have to pay full taxes, full interest and the full penalty for it, but we would not be prosecuted.

Q. Now do you recall about when that meeting was?

A. That was about the 10th of January.

Q. 1949?

A. 1949.

. . . . . .

Q. Did you make more sales off the record?

A. Yes.

Q. You continued cheating on your income tax?

A. That is right.

Q. Did you do anything with respect to travel and entertainment?

A. We continued to jack those up, too.

Q. Now, did you have any more talks with Mr. Davis?

A. After we got the Saver fee paid, sometime after that,

[fol. 42] Mr. Davis spoke to Mrs. Segel and myself and told us that we would have to get up some money, some cash for the boys in New York, that they had been very helpful to us and were asking to be paid off.

Q. How much did he say the boys in New York wanted?

A. I don't know what was asked for. I don't remember the exact amount, but there was a good deal of wrangling there, but I know that we paid a sum of $25,000 to $40,000 for that.

Q. In what form?

A. In cash.

Q. Did he tell you who the boys in New York were?

A. He did not.

The Court: To whom did you pay the money?

The Witness: I brought the money there myself to Mr. Davis's office and put it on his desk as I had done previously.

Q. What was the source of this money?

A. The same source. This money wasn't paid until about six or seven months after the Saver money. We had to accumulate this money. We didn't have it.

. . . . . .

Q. What did you have to do with Davis or anyone else at any later time about this case?

A. Sometime about the middle of 1951, Mrs. Segel and I were called over to Mr. Davis's office.

Q. Who was present?

A. Mrs. Segel, myself, Mr. Hoffman, Mr. Halperin and Mr. Davis. They told us that Mr. Halperin had learned that there is a committee in Washington investigating tax settlements, and that we were not to talk to anybody regarding our tax settlement. If anybody came up to see us, we were to refer them to Schopick & Davis, who are our attorneys, and they would answer them.

[fol. 43] Then about the middle of August, a month after this story, I was up to camp visiting my daughter, Mr. Cohen was in Europe, and when I came in Mrs. Segel told me that she had a visitor from some committee in Washington.

Q. Did she tell you the man's name?

A. A Mr. Shapiro.

Q. What did she tell you had happened?

A. She was very upset, had spent a sleepless night, and she told me she had forgotten all about Mr. Davis' admonitions, and the man came in and told her he was from Washington looking into some—wanted to ask her some questions, and she answered some of these questions. She felt that she had stirred something up, and she was very much agitated about it.

Q. Did she tell you anything about a statement at that time?

A. Yes. This man had asked her a few questions, was very pleasant with her and offered to take her to lunch, and she says she couldn't go. He came back after lunch with another gentleman and a statement of answers she had made to his questions, and asked her to sign it.

Q. Did she sign it?

A. No. She had become alarmed, realized she had made a mistake in talking to this man and refused to sign it. She called Mr. Davis and told him about it. He tried to calm her, pacify her——

Q. Mrs. Segel told you this?

A. Yes, Mrs. Segel told me he pacified her. When I come in this next morning, she related what had happened. Mr. Davis called Mrs. Segel and myself over to his office that day, the day that I returned, the following day after the Shapiro episode, and told us that under no circumstances—yelled at us that under no circumstances—were we to talk to anybody; that we were to keep our mouths shut. He said Mrs. Segel hadn't done any harm, but she had made them believe that they smelled a rat, and he said, "That's an order. Keep your mouths shut and don't say anything to anybody. If anybody wants to ask any questions, send them to me."

[fol. 44] Q. Who was there?

A. I believe Mr. Davis was alone at that time with Mrs. Segel and myself.

Mr. Corbin: Was this still in August that the witness is talking about?

The Witness: This was about the 15th or 16th of August.

The Court: 1951?

The Witness: 1951.

Q. What did you do after you left his office?

A. Well, I think this was a Friday evening. I was entertaining a customer for the week-end and became very alarmed about the situation. Mr. Cohen was returning on Monday morning. He was aboard the Queen Elizabeth, and I felt that I should get some word to him, caution him, somebody might meet him at the pier and talk to him before I could get to him. So I drove this customer back to New York and stayed at the Waldorf-Astoria Hotel that evening. I put in a call that night saying I would like to talk to Mr. Cohen aboard the Queen Elizabeth the following morning. I did. I spoke to him, told him that there was somebody investigating tax settlements in our case, and under no circumstances was he to talk to anybody about our settlement; that I would meet him at the pier on Monday morning, a conference had been arranged at Mr. Saver's office, and we would go over there immediately from the pier; but not to talk to anybody, refer anybody to Schopick & Davis if they did ask any questions about our tax settlement.

Q. Did you meet Cohen?

A. I met Cohen on the pier that Monday morning—I think it was August 20th—with Mrs. Segel, and we went from there to Mr. Saver's office, where we met Mr. Davis too.

Q. Did Mr. Saver take your case at that time?

A. Mr. Davis went in to speak to Mr. Saver for a few minutes, and then we were called in. Mr. Cohen, Mrs. [fol. 45] Segel and myself were called in, and Mr. Saver told us that he couldn't represent us with this Committee; it was a Congressional Committee; that his partner was a Congressman, and that it might embarrass his partner, and therefore he could not represent us. He recommended another attorney that we go down and see, Mr. Boris Kostelanetz.

Q. Did you go see that other attorney?

A. Mr. Davis, Mrs. Segel and myself went to see Mr. Kostelanetz.

Q. Did you have any talk with Davis before you got to see Kostelanetz?

A. Mr. Davis told us that he would do most of the talking with Mr. Kostelanetz, he would sort of draw it out for us, and that we were not to speak of anything that he didn't talk about, something along those lines, of course.

Q. Did you go to see Kostelanetz?

A. We did.

Q. Who went?

A. Mrs. Segel, Mr. Davis and myself went to see Mr. Kostelanetz.

Q. What did Davis say to Kostelanetz?

A. He told Mr. Kostelanetz that we had tax difficulties. He told him everything about it, except the cash that was paid, and he also told him that the King Committee wanted to see us, that they had called Mr. Saver himself up and told him they would like to talk to us.

Q. Did you tell Kostelanetz anything about what Davis had told you about arrangements in Washington?

A. Oh, no.

Q. Nothing about that at all?

A. No.

Q. Or about the cash?

A. No, nothing about the cash. That was all left out. We told him how we evaded taxes and everything else, but we didn't tell about any bribes we had paid.

Q. In Davis' presence, did Kostelanetz give you any advice as to what your conduct should be before the King Committee?

A. Yes; Mr. Kostelanetz told us that it would not serve our purpose if he permitted us to go over and talk to the King Committee. If they had subpoenaed us, he wouldn't [fol. 46] let us talk, that he would advise us to plead the Fifth Amendment.

Q. And Davis was present when he said that?

A. That is right.

Q. Now, during this period of July or early August in 1951 did you have any talks with Smith?

A. Yes. Mr. Smith told us that he too—this is about the latter part of August—that he was subpoenaed by the King Committee.

Q. What was your conversation with Mr. Smith?

A. And he had, and he also had been down to see Mr.

Kostelanetz; he was also his attorney by this time, and Mr. Smith told us, Mrs. Segel and myself, that he was going to talk to the King Committee, he would have to tell what he knows to the King Committee, because he wasn't able to plead the Fifth Amendment.

Q. Now, so far as you know did Mr. Smith know anything about the $100,000?

A. No, sir, he did not.

Q. Or the $20,000?

A. He did not.

Q. Or the $40,000?

A. He knew nothing about any of the cash payments. We were told definitely to keep our mouths shut about that, not to talk to anybody, especially Mr. Smith.

Q. Now, what was the next event that happened here as far as you can recall?

A. Mr. Smith was arrested for signing a false affidavit on August 30, 1951.

Q. Had you heard about that false affidavit before that time?

A. Oh, no, sir, no.

Q. Did you talk with Smith after he was arrested?

A. We went up to see Mr. Smith at his home that evening.

Q. Who is "we"?

A. Mrs. Segel, Mr. Cohen and myself went up to see Mr. Smith at his home that evening. He was very worried. We didn't do very much talking, but I did manage to ask him why he signed this affidavit. He said, "I was told it was the only way to keep you folks out of jail and that is why I did it."

Q. Did he tell you who told him that?

A. No.

[fol. 47] Q. Now, did there come a time when Pattullo was subpoenaed before the Congressional Committee?

A. Yes. That was the following month.

Q. That would be September?

A. That would be about the 20th or 25th of September of 1951.

Q. Of 1951?

A. That is right.

Q. Now, what happened at that time?

A. Well, Pattullo—I was served as secretary of the corporation to bring down Pattullo records, their books, and also as an individual. We furnished the King Committee with the books, and I did not testify. I pleaded the Fifth Amendment.

The Court: Did they ask you questions?

The Witness: Yes.

The Court: And you refused to answer on the ground of the Fifth Amendment?

The Witness: That is right.

Q. Now, did you have any talk with Davis with respect to your subpoena by the King Committee at that time in September 1951?

A. Only except to tell him that we were not going to talk, and he was very glad of that advice and thought it was the only thing, the only advice that could be given to us. He was also subpoenaed and appeared before the King Committee.

Q. Did he tell you what he was going to do before that committee?

A. Yes. He said he would have to talk about some phases of the case but he would not discuss anything that transpired between himself and ourselves, the lawyer-client privilege.

Q. Now, did there come a time when you were subpoenaed somewhere else?

A. Yes, sir. There came——

Q. When was that?

A. There came a few months of quiet and then I think around January, possibly the early part of February 1952, the Pattullo books and records were subpoenaed by the Brooklyn grand jury.

[fol. 48] Q. What did you do when you got that subpoena?

A. I notified Mr. Kostelanetz and Nahum Bernstein.

Mr. Singer: I object to these things.

The Court: Are you objecting to the question, Mr. Singer?

Mr. Singer: I object to any discussion with his counsel, his own lawyer. It has nothing to do with this case, the

advice he got from lawyers who are not named as co-conspirators.

The Court: Are you objecting to the question or what?

Mr. Singer: I am objecting to the question.

(Last question read at the request of the Court.)

The Court: Do you object to that question?

Mr. Singer: Yes, because——

The Court: Are you objecting to the question as such?

Mr. Singer: I do.

The Court: Objection overruled.

Mr. Singer: I respectfully except.

The Court: The witness may answer. What is your answer?

The Witness: I notified Mr. Kostelanetz and Mr. Nahum Bernstein.

The Court: Who was Mr. Nahum Bernstein?

The Witness: Of Silver & Bernstein, who were our lawyers at that time, our only lawyers at that time.

The Court: Do you still object to the answer?

Mr. Singer: No.

The Court: All right. Next question.

Q. Following your notification to those people did you have a further talk with Mr. Davis?

A. Yes, we did, and Mr. Davis was eager to learn about anything that Mr. Bernstein or Mr. Kostelanetz were going [fol. 49] to advise us about. We were subpoenaed a short time later by the Brooklyn Grand Jury and Mr. Davis was greatly concerned about that.

The Court: Where did you meet Mr. Davis and when?

The Witness: Mr. Davis came to our office.

The Court: Can you fix the approximate date?

The Witness: Well, let us see. This action took place between the time the books of the corporation were subpoenaed and our personal subpoena. There was about ten days or two weeks' difference there, and we had seen Mr. Davis several times during those two weeks.

Q. Where did you see him?

A. At our office.

Q. What was said and who was present?

A. Well, Mrs. Segel and myself were definitely present

and I don't know just what he said at the time except to ask us questions about what advice was given to us.

Q. Did you tell him?

A. Well, at one of these conferences with Mr. Davis I told him that Mr. Bernstein and Mr. Kostelanetz were going to Washington in our behalf to see somebody in the Justice Department. He was very much interested in that and tried to see us upon the return of Mr. Bernstein, Mr. Bernstein and Mr. Kostelanetz from Washington. I avoided him for several days, wouldn't take any telephone calls. He finally came up to see me at our office. I saw him alone—him and Mr. Schopick alone. He said, "Morton, what are you going to do? Why are you avoiding me? Are you going to talk?"

I said, "I am going to do what my counsel advises us."

He said, "Well, you can't talk. You would be crazy to talk. If Mr. Kostelanetz told you to do that he is crazy. I will get you any lawyer you want, put it up to him; put it up to this lawyer and if he tells you to do anything that Mr. Kostelanetz does, you can do it, but please take my offer to see another lawyer. Mr. Kostelanetz is crazy to do a thing like that, to advise you to do that."

[fol. 50] I told him I wasn't going to see anybody else, that we were going to take Mr. Kostelanetz's advice.

He said, "Morton, are you going to turn me in?"

My answer was that I was going to take the advice of our attorney, and he and Mr. Schopick left.

Mr. MacMahon: Your witness.

The Court: Do you want a five-minute recess?

Mr. Corbin: Yes.

The Court: All right. The court will take a five-minute recess.

(Short recess.)

Cross examination.

By Mr. Corbin:

Q. Tell me, Mr. Marks, when was it—what year or about what year was it—that you first decided to cheat the Government?

A. I would say the years of 1942.

Q. Was it in 1942 that you first began actually cheating the Government following your decision to do so?

A. I would say so.

Q. About what year was it that you first decided to cheat your partner or cheat Jo Copeland?

A. Well, we didn't actually decide to cheat her.

Q. You just did it?

A. We did it. As a result of what we did, she was being cheated.

Q. Didn't you know when you did it that it would have that result?

A. We knew we were doing it. We would have liked her to share in it. We didn't want to tell her anything about it, and thank heaven we didn't and didn't let her share in it.

Q. I didn't catch that.

A. Just thank heaven we didn't give her any of this money or tell her anything about it.

Q. You thank heaven you didn't give it to her although she was entitled to it?

A. Yes.

Q. When you say thank heaven, do you really mean that?

A. I really mean that.

[fol. 51] Q That you really thank God that you cheated her?

A. That she got no part of this.

Q. How much was her percentage?

A. I think it might have been 30 per cent of the profits or 35 per cent of the profits over a certain figure.

Q. You know what Jo Copeland's percentage of the profits in this business was according to the agreement between you, don't you?

A. I don't know offhand. I think there was a 15 per cent on something and then 50 per cent over a certain figure. I believe it to be that.

Q. Was it in writing?

A. I am sure it was.

Q. And you can't tell us now any better than you have what the terms of the writing were?

A. This agreement was signed in 1939. I haven't seen it since.

Q. You have seen it many times since, haven't you?

A. No, sir.

Q. Or a copy of it?

A. No, sir.

Q. You haven't discussed it and haven't thought about it?

A. No, sir.

Q. Haven't you talked about the terms of the agreement and what it amounted to in dollars and cents that you got out of her that you shouldn't have?

A. No, sir.

Q. Is that so? Do you mean that it just hasn't entered your mind at all, that you were that oblivious to her rights?

A. I think it amounts to that.

Q. All right. From 1942, when you commenced to cheat, I suppose you were worried from that time on that there might be a discovery in some way or other. Is that right?

A. No, I don't think that entered our minds either.

Q. You knew that there were annual audits made, didn't you?

A. Yes, sir.

Q. Annual examinations by the agents?

A. Yes, sir.

Q. You knew that you had to lie or somebody had to lie in order to get away with the agents?

A. Yes, sir.

Q. But that didn't worry you at all?

A. We just didn't think of that, didn't think of getting caught.

Q. But when you concealed, you knew you were concealing, didn't you, in all the years?

A. Yes, sir.

fol. 52 Q. You knew they were there to find out, and you knew that the Government might take drastic measures if they did learn. Do you mean that your mind was a blank on it and it was of no concern to you for all those years down to the time when discovery did occur?

A. That is right.

Q. There was a time when somebody told you—if I remember here this morning—that you might as well jump out the window. Do you remember that?

A. Yes, sir.

Q. When and where was that, and who told you that?

A. Mr. Smith, our accountant, told me that. That was in the early part of 1947. I think I placed it about May.

Q. I didn't catch that.

A. I think I placed it about May of 1947?

Q. Were you worried then?

A. Certainly.

Q. What were you worried about?

A. Worried about what we had done.

Q. You were not worried about what you had done nearly as much as what was going to happen to you, whether you were going to go to jail or not. Isn't that so?

A. I think that is right, too.

Q. What you were worried about then and thereafter, and at all times down to the time when you got immunity here by your deal with the Government, was whether you were going to have to go to jail for some of your misdeeds. Isn't that right?

A. I think that is right.

Q. In order to stay out of jail, so to speak—that is, in order to kill criminal prosecutions—or to conceal facts in order to avoid criminal prosecutions with a possible result of jail, you lied many times, didn't you?

A. I did, sir.

Q. And under oath many times?

A. No.

Q. No?

A. Well, I suppose when I signed my income tax statements, yes.

Q. And when you talked with the agents?

A. Well, I was only under oath I think the time I signed the statement.

Q. Didn't you know it was a crime to make false statements to revenue agents and special agents? You knew that, didn't you?

A. Well, I lied about it. I admit that.

[fol. 53] Q. And lied to the agents?

A. That is right.

Q. You lied to Jo Copeland, didn't you?

A. Yes, sir.

Q. Whom else did you lie to, all to stay out of jail?

A. I don't know.

Q. Did you lie in that sworn affidavit that was introduced here today and that you read before it was marked in evidence?

A. Yes, sir.

Q. So that even after discovery, even after you had heard that the criminal phase of the matter had been disposed of and that a civil settlement was going to be accepted, as you said, even after that you continued to cheat the Government, didn't you?

A. I did.

Q. You continued to cheat Jo Copeland?

A. I did.

Q. And you continued to lie, even to the extent of a written, signed perjurious statement to the Government; right or wrong?

A. That is right.

Q. And you say here today you are telling the truth?

A. I am.

Q. To stay out of jail?

A. Yes, sir.

Q. You say here today, and I suppose you told the Government folks the same thing before, before you made the deal with them, that you gave Davis $100,000 in cash in his office, right?

A. That is right.

Q. And then you gave him $16,000 or thereabouts; which he told you he was going to give to Mr. Saver. Is that right?

A. That is right.

Q. Then on another occasion you gave him $25,000 to $40,000, is the way you put it I think?

A. Yes.

Q. For what? I have forgotten now. Oh, which Davis told you was for the boys in New York, right?

A. Yes.

Q. You didn't know who the boys were in New York?

A. No.

Q. And you didn't ask?

A. That is right.

Q. All these you say were in cash?

A. Yes, sir.

Q. And you took Davis's word for it, you say?

A. Yes.

Q. As to the place they were going and the person they were going to?

A. Yes, sir.

[fol. 54] Q. Did you trust him or were you scared of him?

A. No, we trusted him. We trusted him. We had to do what he asked us for. We did what he asked us for. We certainly didn't initiate these payments.

Q. He ran the show pretty well as far as this cash was concerned for a couple of years, did't he?

A. Yes, sir.

Q. He told you you have got to get up this cash—you told us this morning—you have got to do this, you have got to do that. Is that right?

A. That is right.

Q. And you, like a little lamb, just obeyed what he said. You just went along, and when he told you something, that was the law to you, so to speak, right?

A. That is right.

Q. Was that because he had something on you or because he thought he had something on you, that you thus knuckled down to his every wish and command?

A. No, because we thought that was the only way to do it——

Q. The only way to stay out of jail?

A. That is right.

Q. Have the taxes of the company been paid?

A. They have been paid for some years. The 1942 to 1946 has been paid.

Q. You told us two or three methods by which you accumulated cash?

A. That is right.

Q. I don't care to repeat. There was the entertainment and the sales and the deposits in the safe deposit box of the cash proceeds of the sales, and what not?

A. Yes.

Q. Anyway, can you tell the jury what amount on an average, say, per year you were able to accumulate in that manner?

A. Offhand, I don't know those figures.

Q. Could you, for instance, accumulate, within reasonable bounds I will say, almost any amount that you wanted to?

A. Any reasonable amount.

Q. And did the amount that you did accumulate vary?

A. Yes, they varied in some years more than others.

Q. Davis wasn't sitting in with you in all these dealings without having his mouth filled, was he?

A. Well, Davis got a little over $100,000 in checks for payment of his services, if that is what you mean.

[fol. 55] Q. Before you came down here, long before you made the final deal with them on immunity, did you talk with Davis, Schopick, Hoffman and your friends, the stockholders in the company, about this story you were going to tell?

A. No, sir.

Q. Do you mean that, Mr. Marks, you didn't talk with any of them?

A. Did I talk with my stockholders? My partners, you mean?

Q. Yes.

A. You asked me if I talked to a number of——

Q. Yes, I thought the corporation was stock, but did you talk with your partners about it?

The Court: About what?

Mr. Corbin: About what he was going to tell the Government.

The Court: Tell the United States Attorney?

Mr. Corbin: Yes.

The Witness: Of course I did.

Q. What is that?

A. Of course I did. We refreshed our memory about what happened.

Q. You got together and talked it over so all your stories would be alike?

A. If you want to put it that way, but we didn't do that. We refreshed our memory about certain things.

Q. Was it your purpose in refreshing your recollection

to refresh also the memory of the others in the group so that you would come up with a composite story that would jibe all around and fit in with all the memories that you all had on the subject? Is that a fair statement?

A. No.

Q. Well, you talked.

A. That is right.

Q. You talked about what you were going to say, right?

A. We talked about what had happened, sir.

* * * * * * *

Q. You reached an understanding at sometime with the Government, whether in New York or Washington, or Timbuctoo, you reached an understanding with the Gov- [fol. 56] ernment whereby you would testify and, for giving the testimony about this story about the money, you would stay out of jail. That is the effect of it, isn't it?

A. That is right, sir.

Mr. Corbin: Thank you. That is all.

Cross examination.

By Mr. Singer:

Q. Mr. Marks, have you ever tried to figure out how much money you paid in fees in connection with this matter?

A. Yes, I did.

* * * * * * *

Q. That brings us up to $355,000. Tell us some more.

A. I think you have got it now.

Q. Is it a good round figure to say $350,000? Am I about right?

A. About right. It might be a little less than it really is.

Q. So far we have Schopick and Davis. We have Kostelanetz. We have Scher & Roder. We have the accountants Greenstein. We have Mr. Blue. We have Saver. How about Hoffman? How much did you pay him?

A. Hoffman was not paid by us. He was a member of the firm, we thought, or an employee of Schopick and Davis.

Q. You said he was a member of the firm, "we thought," or you said an employee. Which was it?

A. I don't know. I never asked. I believe his name was on the stationery of the firm of Schopick & Davis.

Q. As what?

A. I don't know. I don't recall. I think I saw him once on the stationery.

Q. And the stationery of Schopick & Davis was the stationery of a law firm. It says attorneys at law?

A. And I think I saw his name on one piece of stationery. It doesn't necessarily make him a partner, I agree with you.

Q. I am not suggesting it one way or the other. It is only what you know. Did Hoffman ever say to you that he was a partner?

A. No, sir.

[fol. 57] Q. Did Davis ever say that Hoffman was his partner?

A. No, sir.

Q. Did Hoffman ever work on your books, to your knowledge and in your observation?

A. No, sir.

Q. Let me ask you this: Don't you remember a time when some of your books, while Greenstein and this other accounting firm, Weisberg & Greenstein, were working on them, were taken out of his office and brought over to Davis's office?

A. I don't recall that, but it is very possible it could have happened. I wouldn't have denied it.

* * * * * * *

Q. You mean that is the first time you actually got the immunity, in 1952?

A. That is right.

Q. And that was four or five months after you had retained Kostelanetz and Bernstein?

A. That is correct.

Q. Are you sure about that date? Stop and think about it.

A. I think you can refer to the records and get a more certain answer.

Q. I don't have any records.

A. I mean to my testimony earlier.

Q. I am not interested in the testimony. It is what you remember now when you are talking to me, please.

The Court: Let us make the question specific. You are asking him now when he first got this promise of immunity?

Mr. Singer: Yes.

A. I believe it was in February of 1952; sometime between the 9th of February and the 25th of February, 1952. I will place it a little closer.

Q. Were you told by your lawyers that this immunity had been obtained in Washington?

A. Yes, sir.

Q. From the Attorney General?

A. From the Justice Department, whoever it was.

Q. You have been talking about immunity. Have you ever been told that the Attorney General or anybody [fol. 58] connected with the Government had the power to give you immunity?

A. Mr. Kostelanetz and Mr. Bernstein told us that they don't have the power to do it——

Q. Just hold on a minute.

The Court: Let the witness finish the answer. Finish your answer.

The Witness: That they don't have the power to do it, but advised us to accept their promise anyway.

Q. And you say now that the first time that you learned of the affidavit of Smith was after he was arrested and the day you went up to see him?

A. That is correct.

Q. After he had been released on bail several days after his arrest?

A. I think it was that same evening.

Q. Well, I am not holding you to the date. Now, let me see. Smith now said to you, did he not, this night when you came up to see him, "I made this false affidavit because it was the only way to save you fellows in Pattullo from going to jail"?

A. "I was told," that is right.

Q. He said that to you?

A. He said, "I was told that was the only way to keep you out of jail."

Q. But he told you he made that for that reason?

A. That is right.

Q. And yet you say you didn't even know he had made it?

A. Until after he was arrested.

Q. Now, did you say to him, "Now, Mr. Smith," — incidentally, how did you address him?

A. Maurice.

Q. Maurice?. Did you say to him, "Maurice, I never asked you to do it. Why did you do it"?

A. I think I testified to that.

Q. Well, did you say it to him?

A. "Just why did you do it?"

Q. Well, did you point out to him and say, "Now, Maurice, I didn't ask you to do it; I am not responsible for what happened to you"?

A. No, I didn't point that out to him. I realized what the man had done, and he had gone out on a limb [fol. 59] to help us, and I think it would have been pretty bad to point it out to him.

Q. It would have disturbed your conscience to point it out to him?

A. Yes.

Q. Tell me, did you ever get a chance to see that affidavit?

A. No, sir.

Q. And did you ever discuss with Smith the purpose of the affidavit or when it was made?

A. When it was made?

Q. Yes.

A. No.

Q. The purpose of it? Did you discuss that?

A. Yes.

Q. Well, now, what did Smith tell you had been the purpose of that affidavit?

A. The purpose of that affidavit was to establish a voluntary disclosure of our tax case, thereby getting us a no-prosecution status with the Department.

Q. Smith now said to you that he had falsely sworn that he had made such a voluntary disclosure on this day when you visited him, a night or two after he was arrested?

A. I didn't say that.

Q. Now, did Smith maintain that the affidavit was true?

A. No, sir.

Q. Well, did he maintain that he had—I think you said before that he lied for you people to keep you from being put in jail?

A. Yes. He didn't walk over and tell me he falsely swore to something. I asked him why he did the thing and he told me.

Q. And since that time you have never taken the trouble of finding out when the affidavit was made or what it contained?

A. Oh, I told you what the purpose of it was, what he had told me.

Q. And that was the only time he had told it to you? Have you ever seen it?

A. Never.

Q. Has it ever been read to you?

A. No, sir.

Q. Do you remember an occasion when for a period of maybe four or five or six hours one night you and another one or more of your associates were at the [fol. 60] United States Attorney's office making a statement? Do you remember that occasion?

A. Yes, sir.

Q. Now, how many hours were you there that night?

A. I would say three or four hours.

Q. And stenographers were present taking down what you said?

A. That is right.

Q. Now, that statement was made, and if I am in error you correct me, after you had received this promise of immunity?

A. That is right.

Q. On the theory, as you said here today, that you were to tell the truth?

A. Yes, sir.

Q. Or you said yesterday?

A. To the best of my knowledge I was to tell the truth.

Q. To tell the complete truth?

A. That is right.

Q. Not part of it; but all?

A. All that I could remember, that is right.

Q. Now, limiting my inquiry to just certain things, did you tell those people in this statement which was stenographically recorded about $40,000 or $20,000 for the boys in New York?

A. I did not.

Q. Because you didn't remember?

A. That is right.

Q. Not because you lied about it?

A. That is right.

Q. And didn't want to say it?

A. That is right.

Q. You testified yesterday that you continued this practice of cheating the Government in its income taxes during 1947, 1948, 1949, 1950, 1951. Didn't you say that yesterday?

A. That is right.

Q. Now, when you were examined in Brooklyn in 1952 did you tell them that fact?

A. I believe I did.

Q. You think so?

A. I think so.

Q. Did you tell them the amount?

A. I think so, with the exception of the $25,000 to $40,000.

Q. Which you couldn't remember?

A. Which I didn't remember. I had completely forgotten about it.

Q. Now, let us see. After you made that statement in Brooklyn,—

A. Yes.

[fol. 61] Q. —— were you shown the statement?

A. No, sir.

Q. Did you sign it?

A. No, sir.

Q. Were you under oath?

A. I was in the grand jury, sir.

Q. Now, you appeared before the grand jury in Brooklyn?

A. That is right.

Q. At this time, Mr. Marks, you were operating as you are today with immunity to tell the truth?

A. That is right.

Q. Did you tell that Brooklyn Grand Jury anything about that $15,000 to $40,000?

The Court: Twenty-five to forty.

Q. Twenty-five to forty?

A. No, sir.

Q. Not a word about that?

A. No, sir.

Mr. MacMahon: Your Honor, I object to it. Was he asked about these questions?

Mr. Singer: All right, that is a good question. Good counsel.

The Court: All right, now, go ahead. I will overrule the objection. Go ahead.

Mr. Singer: At this point I ask the Government to produce for your Honor's inspection under the rule announced in the case of *United States v. Krulewich* the grand jury minutes and the statement the witness has described he made so that your Honor may examine them and then furnish them to us; in view of the witness's statement that testimony here conflicts with the tesimony he gave in the statement and before the grand jury.

The Court: I don't believe you have established a sufficient foundation for that. The witness has stated that he did not make statements about the $25,000 to $40,000, and he said he completely forgot it.

Mr. Singer: Your Honor—

The Court: To that extent you have established the fact.

[fol. 62] Mr. Singer: Now I don't have to rely on his statement. It appears now that his testimony here is not in accord with what he swore to in Brooklyn.

The Court: No, it does not. Wait a minute. I am not going to argue that with you, Mr. Singer. I will be glad when I get to the appropriate time to run through the

grand jury minutes and run through the statements that were given in Brooklyn to see if there is anything in there that I believe should be brought to the attention of anybody, and that is on my general belief that anything which is in the possession of the Government which would in any way help a defendant should be equally available to the defendant. However, neither side is entitled to work papers in preparation for a case unless there is something there which is material and helpful to the defendant. I would not require the Government to give you their examination of a witness any more than I would require your defendant to give the Government any memorandum you may have made in your office.

Mr. Singer: At this point all I ask is that they be given to your Honor for examination.

The Court: I will be glad to.

Mr. Singer: And I am suggesting further that they be marked as a Court's exhibit so that the clerk may have a proper entry in the record.

The Court: I will be glad to examine them at the appropriate time.

Mr. Singer: At this point that is as far as I go.

Mr. MacMahon: I submit at this point he has laid no such foundation.

The Court: I am inclined to agree with you, Mr. MacMahon, but I have a very firm feeling that if a defendant feels there may be something helpful to him in a Government record, it is the duty of the Court to examine this. I don't want it, but I guess I will take that burden upon myself.

[fol. 63] By Mr. Singer:

Q. Now, let us go on. After you testified before the grand jury in Brooklyn and after you made the statement, the stenographically reported statement, do you remember the time when you were called before a congressional committee in Washington after that?

A. Which committee was that, sir?

Q. The King Committee, the subcommittee of the committee for the Internal Revenue?

A. I appeared before the King Committee and I appeared before the Keane Committee.

Q. The Keane Committee, I am sorry, you are correct; Keane.

A. Keane Committee.

Q. Congressman Keane from New Jersey was presiding.

A. That was in 1953.

Q. That is right.

A. Yes.

Q. Now, you already had been promised immunity and you were going to cooperate, is that correct?

A. That is correct.

Q. Now, do you remember appearing before that committee and refusing to answer any questions to the Government on the ground that it might incriminate you?

A. That is right, sir.

. . . . . .

Q. As I understand you now you didn't feel too badly about stealing from Jo Copeland because anyway, she was making $70,000 when you were making ten?

A. It appeased our conscience a little.

Q. That is right. Now, let us ask the next question. It was on Jo Copeland's designing that Pattullo Modes built its success, isn't that a fact?

A. That is right.

Q. It was Jo Copeland's designs and brains on which Pattullo Modes made its name and its fame as well as its sales, isn't that right?

A. That is right.

. . . . . .

[fol. 64] Q. When you saw Mr. Willys Newcomb, that was sometime before 1954, wasn't it—during 1953?

A. I think it was in 1954. I don't think it is that far back.

Q. Was there a stenographic record made of any statement that you made?

A. You mean in the grand jury or with Mr. Newcomb privately?

Q. With Mr. Newcomb.

A. With Mr. Newcomb privately.

Q. That is right.

A. No, he took notes or other gentlemen around the table took notes.

Q. Were you questioned about how much money in currency or cash you claimed you had paid Mr. Davis?

A. Yes.

Q. This time that we are speaking of—that is, this interview with you about Mr. Davis—was that before you appeared before the grand jury in New York?

A. That is right.

Q. At that time, did Mr. Newcomb ask you how much money you had paid in cash or currency to Mr. Davis?

A. He did.

Q. Did you mention anything about the $25,000 to $40,000?

A. I didn't.

Q. You did not?

A. That is right.

Q. Did you mention anything about the $16,000?

A. I did not.

Q. All you say you mentioned then would be the $100,000?

A. That is right, sir.

* * * * * *

Q. Is there anything that I can do to help you refresh your recollection?

A. If you can, I wish you would.

Q. Do you remember when you testified before the grand jury in this district?

A. When I did?

Q. When you did, if you mentioned anything about the $25,000 to $40,000.

A. At the grand jury? No, sir.

Q. In Manhattan now, in this building.

A. Yes.

Q. You still had not remembered about the $25,000 to $40,000?

A. That is right.

[fol. 65] Q. When was the first time when your memory became better on that?

A. When I received a telephone call from Mr. Kostelanetz and Mr. Bernstein that they wanted to meet with me.

Q. When was that?

A. Three or four months ago.

Q. Before Christmas?

A. Yes.

Q. Before Thanksgiving?

A. I think so.

Q. Before Election Day?

A. Yes, I think so.

Q. You think it was before Election Day. Is that right?

A. It could have been before Election Day. It could have been after Election Day. I can't place the time. I have a feeling that it was in the fall. It might have been September or October.

* * * * * * *

Q. All in all, how many times would you say that you have been questioned about this case, this whole incident and the cash that you claimed you had paid to Davis, and you never mentioned this $25,000 to $40,000 item?

A. You are asking me how many times?

Q. Yes.

A. By Mr. O'Hara do you mean or by everbody?

Q. Everybody.

A. I think six, eight or ten times at least.

Q. And this questioning extended over a period of time from January 1952 until November of 1954?

A. Approximately, yes, sir.

* * * * * * *

Mr. O'Hara: First we have the Brooklyn Grand Jury minutes, the testimony of Morton Marks, on March 13, 1952, and April 17, 1952.

The Court: That will be marked Court Exhibit 2.

(Marked Court Exhibit 2.)

Mr. O'Hara: Then we have the grand jury testimony in the Southern District of New York.

(Marked Court Exhibit 3.)

* * * * * * *

[fol. 66] Cross examination continued.

Mr. Singer:

Q. Before recess we were talking about your first visit to the Davis & Schopick office. Now at that time you didn't see Mr. Halperin, did you?

A. No, sir.

Q. So am I correct in saying that more than a year went by and you still hadn't seen Mr. Ha-perin?

A. Well, let me put it this way: I had seen him but never been introduced to him until a great deal later.

Q. When you say you had seen him, where had you seen him?

A. At the office of Schopick & Davis.

Q. Did he have his name on the door?

A. I don't believe so.

Q. You don't think so?

A. No.

Q. Did you ever look at the door, the office door?

A. Just opened it; I don't think I ever read it.

Q. From June, 1947, when you paid the first $7,500 until April 12, 1948, when by which time you had paid $25,000, you didn't talk to Mr. Halperin at all?

A. I think that is right, sir.

Q. Now we go on to May and June of 1948 and you still haven't talked to Mr. Halperin.

A. Well, I believe it was about June.

Q. So it would be a year after you had retained Schopick & Davis when for the first time the name of Halperin was mentioned?

A. I think that is right, sir.

Q. Now, it was Davis who mentioned Halperin's name, wasn't it?

A. Yes, sir.

Q. It was Davis who, if I remember your testimony correctly, said that all the time while he had been looking for somebody he had a man in his office who he has now learned could have helped him?

A. That is correct.

Q. Now, had Mr. Davis told you he was looking for somebody to help him?

A. He employed Saver and Schwaeber for that purpose.

Q. Well, you say he employed; you hadn't employed them at all?

A. That is right.

[fol. 67] Q. You never talked to Mr. Schwaeber, did you?

A. No, sir.

Q. Did you ever speak to Mr. Saver until 1949?

A. I personally have not, sir.

* * * * * *

Q. Do you now say that between April, 1947 and June, 1948, Mr. Davis, Hoffman, and Schopick never discussed cash currency to be used in the tax case with you?

Mr. MacMahon: Your Honor, I object to the question. It is repetitious.

The Court: Overruled. I will let the witness answer.

A. To the best of my recollection I think that is correct.

Q. Now, how much in cash do you say you had by June, 1948?

A. I don't know, sir.

Q. Well, could you estimate it for me? Was it up to $70,000 anyway?

A. No, it wasn't up to $70,000 because we only had that in September.

* * * * * *

Q. Is there a single record available that you could bring here from which I could see how much money in cash you had in that box at the end of December 1947?

A. There is no record.

Q. It is your word, sir, that there was a certain amount?

A. That is right.

Q. You were the only one in 1947 that had access to that box?

A. No, sir, Mrs. Segel had access to it.

Q. I think you said that you were the only one that went to the box?

A. That is right.

Q. So that you were the only one in the world, so far as you have been able to tell me, who could say how much

money was in the box, if there was any at all, at the end of December, 1947?

A. That is correct.

[fol. 68] Q. And you are the only one in the world who can say, and there is no record that you can produce to support it, as to how much money you took or received from the firm to put in the box during that period of time from April, 1947, to December, 1947. Is that right?

A. That is right.

Q. So that it is your word and your word alone. Is that correct?

A. That is right.

Q. Now, let's go from January to June, 1948. Did the same conditions continue, that you were the only one that went to the box?

A. That is right, sir.

Q. You were the only one that took the money, the cash, from the firm and brought it to the box?

A. That is right.

Q. Does the same condition continue, that there is no record available for us to inspect as to how much the amount was?

A. There is absolutely no record.

Q. So that brings us up to June, 1948. I think you said Mrs. Bellet used to have little slips on which she wrote the amounts of the cash while she was there. Isn't that right?

A. That is right.

Q. But when she left, there was nobody who wrote amounts of money on slips. Is that right?

A. That is right.

Q. Your partners relied on you and you alone to tell them how much money was cached away in the Bowery box. Isn't that right?

A. That is right.

Q. And that condition continued through July of 1948. Am I right?

A. That is right.

Q. It continued to August of 1948?

A. That is right.

Q. It continued to September of 1948?

A. That is right.

Q. It continued to October of 1948?
A. That is right.
Q. And then it continued to December of 1948?
A. That is right.

* * * * * *

Q. Davis had told you about the man in his office, who was under his nose and he hadn't thought of him. Now, Davis made an appointment for you to come to the office and meet Mr. Halperin?
A. That is right.
[fol. 69] Q. That is the time I am talking about, because that is the first time, if I am correct, that you ever talked to Halperin?
A. That is right.
Q. Except for seeing him when you came in?
A. Cursory greetings, that is right.
Q. In this talk with Halperin, when Halperin was present, tell me every single word, as best you can remember, of what Davis or Halperin said and what anybody else said who was present then and there.
A. I have already told you in my testimony what Mr. Davis said. He introduced——
Q. Please tell us.
A. He introduced Mr. Halperin. Mr. Halperin told us that he has known this man for a long time; if we wanted him to, he would go down to Washington and talk to him and see if he could help us along with our case.
Q. Was the kind of case mentioned? While you were present, did anybody say it is an income tax case?
A. No, sir.
Q. Did anybody say it was a Pattullo Modes' income tax case?
A. No, sir.
Q. Did anybody say it was Mr. Morton Marks's personal income tax case?
A. No, sir.
Q. Some time passes and you see Mr. Halperin again. Is that right?
A. That is right.
Q. This I believe was a couple of weeks later?

A. That is right.

Q. Again it was at Mr. Davis's office?

A. That is right.

Q. Again Mr. Halperin was there and Mr. Davis was there, is that right, and you were there?

A. That is right.

Q. Was there anybody else with you?

A. Mrs. Segel.

Q. Incidentally, was she there the first time as well?

A. Yes.

Q. Was Hoffman there in the room on the first occasion?

A. Yes.

Q. Was he there on the second occasion?

A. I don't recall. He might have been.

[fol. 70] Q. Was Schopick there on either of those visits?

A. No, sir.

Q. Now, Mr. Halperin said something and your people said something? Tell us what they said.

A. Mr. Halperin came back from Washington and told us that he explained our case to his friend in Washington and that he thought he could be of assistance to us, that he could be of assistance and would start working on it immediately.

Q. And that was all that Mr. Halperin said?

A. That was the substance of it.

Q. And then that meeting broke up?

A. That is right.

Q. Now, you saw Mr. Halperin again, did you not?

A. Several times after that, a couple of times after that.

Q. Now, we are still around the end of June or early part of July, is that right?

A. That is right.

Q. Did you see Mr. Halperin any more during the summer of 1948?

A. I think I saw him a couple of times.

Q. Well, do you have Mr. Halperin's name in that day book?

A. No, sir.

Q. Where did you see him?

A. At Mr. Davis's office.

Q. Was it by appointment?

A. Possibly. It must have been.

Q. You don't have any recollection?

A. A telephone appointment,

Q. Will you tell us what if anything Mr. Halperin said at these other occasions when you say you saw him?

A. Mr. Halperin reported that he had either heard from Washington or had been to Washington and he had heard that they are making progress or that he was about to go to Washington.

Q. And that in sum and substance was again all that Mr. Halperin said?

A. Yes.

Q. And all that was said by the others in the conference when Halperin was present, is that right?

A. That is right.

Q. Now again we come to September. Then you had a meeting with Mr. Davis, didn't you?

A. Yes, sir.

[fol. 71] Q. Halperin was not there?

A. No. Davis and Hoffman.

Q. Davis and Hoffman, is that right?

A. That is right.

Q. Now, I believe that this stenographic record is incorrect——

Mr. MacMahon: I think maybe it is.

Mr. Singer: At page 229 that name is Halperin and later he said Halperin wasn't there.

Mr. MacMahon: I will concede that that is an error.

Mr. Singer: And I would like that name changed on the record at page 229 from Halperin to Hoffman.

The Court: Is that the question "Now who was present at this conversation?"

Mr. MacMahon: Yes, and my next question was, was Halperin there, and the witness answered no. I think it is an obvious error.

The Court: I believe it was Hoffman and Mr. Davis.

Mr. Singer: That is correct. I wanted that stenographic record corrected.

Q. Now, coming back to September 1948, you went over to Davis's office; Davis and you and Mrs. Segel and Hoffman were there?

A. That is right.

Q. Is that one of the days that is mentioned where the word "Davis" appears in the day book?

A. No. I said that was early in October.

Q. Halperin was not present at this time?

A. No, sir.

Q. And Davis told you a story in substance about somebody wanting $200,000 Halperin had reported to him and he reported it to you?

Mr. MacMahon: Your Honor, I object to the characterization in the question Davis told you a story.

The Court: Oh, well, I will overrule it. Let it stand.

[fol. 72] Q. Well——

The Court: No, no, he can answer the question.

The Witness: Now, would you repeat the question?

Q. Well, let me straighten it out.

The Court: Do you withdraw the question?

Mr. Singer: I will withdraw it.

Q. Davis was there now and Hoffman was there?

A. That is right.

Q. Halperin was not there?

A. That is right.

Q. Schopick was not there?

A. That is right.

Q. Mrs. Segel was there?

A. Yes, sir.

Q. And you, Morton Marks?

A. Yes.

Q. Just the four of you, is that right?

A. That is right.

Q. Davis told you in Halperin's absence that Halperin's friend in Washington would be able to achieve the result which you wanted and it would cost you a lot of money in cash, approximately $150,000, is that right?

A. That is right.

Q. And you offered 50,000 instead?

A. Yes.

Q. And said that is all you had?

A. That is right.

Q. Davis' reply in substance was that the people, whoever they were, no name had been mentioned, had wanted $200,000 but would cut it down to one hundred and fifty?

A. That is right.

Q. And Halperin was not there when that was said either?

A. That is right.

Q. Now, you left with the offer of $50,000?

A. That is correct.

Q. With Davis saying in substance or in words that it was a silly offer, $50,000?

A. That is correct.

Q. Very, very silly I think is the exact language you used, is that right?

A. Practically that.

Q. And Halperin was not there?

A. That is right.

[fol. 73] Q. Isn't it a fact that from the date or the time of this meeting with Davis and Hoffman in September you didn't see Halperin until sometime in May or June 1951?

A. Now, will you rephrase that, please? Will you restate it, please?

(Last question read.)

The Witness: I don't think we had any further conversations with him. I might have seen him in the office; no real conversations with him.

Q. When I speak of conversations I don't mean a hello or a good-bye; I mean a talk that would be relevant to the issues on trial here. Do you know what I mean?

A. Yes. All right, as long as you understand what I mean.

Q. Well, we understand each other?

A. Yes.

Q. So that from August of 1948 until June or July of 1951 you didn't see Halperin or speak to him—I will correct it: You didn't speak to Halperin about your case or the Pattullo case at all, isn't that right?

A. That is substantially correct.

Q. Now, in the meantime during these two years when you didn't see Halperin or talk to him about the case, you say you brought $100,000 to Davis's office with Mr. Zipser?

A. Yes, sir.

Q. You put the money on the table and Zipser, you, Davis and Hoffman were present?

A. What is that?

Q. You said you put the money on the table or the desk in front of Davis, with Hoffman there, and you and Segel left the money there?

A. No, Mrs. Segel wasn't there.

Q. You and Zipser left the money there and you went away?

A. That is right.

Q. And again Halperin was not there?

A. That is right.

Q. Some months later in 1949, be it January, February or some months after that, you brought $16,000 alone?

A. No. Mr. Davis came up for the $16,000 to my office.

Q. Oh, Mr. Davis came to your office and you and he were alone?

A. That is correct.

[fol. 74] Q. Is that right?

A. Yes.

Q. And Halperin was not there?

A. That is right.

Q. Now, we come again to the $25,000 to the $40,000: This time you came alone to the Davis office?

A. That is correct.

Q. Is that right?

A. Yes.

Q. Am I correct?

A. That is right.

Q. And you left the $25,000 or the $40,000 on the table in front of Davis and Hoffman?

A. I think Mr. Davis was there at that time.

Q. Just Davis alone now?

A. Yes.

Q. And you left it there and you went away and Halperin was not there?

A. That is right.

Q. So that during June, July and August of 1948 on the occasions when you spoke to Mr. Halperin money was never mentioned?

A. Not with Mr. Halperin.

Q. And not in his presence either?

A. That is correct.

Q. So that any talk you had about money or leaving checks, fees, was had with Davis and Hoffman or Schopick or Davis alone, but never when Halperin was there? We are sure of that, isn't that right?

A. That is right.

Q. Now, of course, Davis, you say, told you that he was going to take the $100,000 and give it to Halperin to hold, isn't that right?

A. That is right.

Q. And if everything went well Halperin would take the money and give it to some unnamed person in Washington?

A. Some man in Washington.

Q. Well, tell me this; Did Mr. Davis tell you, "Don't mention any money in front of Halperin. I don't want him to know what you and I are doing"?

A. No, sir.

. . . . . .

Q. So you did not consider you were cheating in 1947 and 1948 when you were not entering the money on your books and you were jacking up, as you told Mr. MacMahon, your travel and entertainment and certain other items?

[fol. 75] A. Well, we might have been cheating, and we probably were. We were doing it for the purpose of settling our problem. We would have used every cent we had to keep ourselves and our families out of jail. I have said that before. I will say it again.

Q. And to use every method to keep yourselves and your families out of jail?

A. Every reasonable method.

Q. Every reasonable method including telling a Government agent, Mr. Baradell, that you would not cheat any

more, just when you had escaped, as you believed, criminal prosecution for it?

A. Did we have any alternative?

. . . . . .

Q. That is what I wanted to know. I want to know what Mr. Halperin said.

A. Why didn't you ask me? I am trying to tell you the testimony. Mr. Davis told us in Mr. Halperin's presence that Mr. Halperin had learned there was a committee investigating tax settlements in Washington, and that somebody might be up to see us.

Q. And that if they came up to see you, Mr. Davis said refer them to Schopick and Davis, your lawyers?

A. That is right.

Q. And don't discuss anything with anyone; "Refer them to us"?

A. That is right.

Q. Did Davis say that day, when Mr. Halperin was there, that if you were called before a grand jury, you should lie?

A. Did he say it on that day?

Q. Yes.

A. No.

Q. Did he say when Mr. Halperin was there—I am not interested in anything he said when Mr. Halperin was not there—but when Mr. Halperin was there, did he say to you, "If you are called before a committee, lie about this thing?"

A. He didn't say a lot of things, but he did tell us to keep quiet, not to answer any questions, and refer them to him.

Q. You got the same advice as that when you went to Mr. Kostelanetz, didn't you—don't say anything to anybody [fol. 76] refer them to us?

A. No, I don't think so. I think that Mr. Kostelanetz's advice, when we appeared before the King Committee, is not to testify on the grounds that it might tend to incriminate us.

Q. You didn't say anything to anybody.

A. That is right. It isn't the same.

Q. In other words, you say Davis didn't use the words

"Refuse to answer on the ground that you are not required to give information against yourself," while Kostelanetz put it the way you just put it?

A. Maybe that was the only difference.

Q. And that was all that took place in the discussion when Mr. Halperin was there in 1951?

A. That is right.

Q. In January, 1949, when Mr. Baradell told you that this criminal prosecution was out, that ended for some time any further discussion about criminal prosecution, didn't it?

A. That is right.

Q. You went about your business of trying to settle your civil tax matters with Mr. Davis and the accountants. Isn't that right?

A. That is right.

Q. No more for a long time was there any discussion about criminal prosecution or worry or thought of criminal prosecution?

A. No, except the two future payments, the cash payments.

Q. But I am speaking with respect to the criminal prosecution.

A. That is right.

Q. That all ended, the whole thing ended, in January, 1949?

A. That is right.

Q. Nothing occurred at least for several years with respect to that until the grand jury was reconvened or the Congressional Committee was organized in 1951?

A. That is right.

Q. All that took place after January 1949 had to do with settling that civil amount of the tax due. Isn't that right?

Mr. MacMahon: The witness has not said that. He said that he had cash payments after that.

[fol. 77] The Court: Let the witness answer the question. The objection is overruled.

Answer the question.

Q. Didn't you say to me that as far as the criminal proceedings were concerned, it was all over and ended in

January, 1949, when you were in Mr. Baradell's office and officially told that the criminal proceedings would be discontinued? Isn't that right?

A. All over for the time being, that is right.

Q. All over as far as these years from 1942 to 1946 were concerned?

A. That is right.

Q. And that ended it as far as you were concerned. Isn't that right?

A. The criminal end of it.

Q. That is what we are talking about, this possibility of a criminal prosecution for your own tax fraud and the other tax fraud?

A. That is right.

. . . . . .

By Mr. Rosenblum:

Q. Isn't it a fact that Mr. Hoffman said a lot of things to you that you found to be untrue?

A. No.

Q. Isn't that so?

A. I certainly think there is a lot of evidence to that.

Q. Isn't it a fact, and I want to be very fair about it—I don't mean you are unfair—isn't it a fact that there were many things that Mr. Hoffman implied to you or led you to believe would happen that never happened?

A. I think that is true, too.

Q. Well, didn't he lead you to believe—that is, Hoffman—that because of his many friends, Reagan, Steinberg, in the Ninth Avenue office that he could take care of your matter right there?

A. That was his stock in trade.

Q. That was his stock in trade?

A. Yes.

Q. And you found, did you not, that that was not so?

A. That is why I am here today.

Q. You relied on Hoffman and his representations?

A. That is right.

[fol. 78] Q. And he gave you quite a bit of window dress-

ing to show you where his friendship was, you and Mrs. Segel?

A. That is very true.

* * * * * *

Q. You did appear before the grand jury, did you not, in the United States District Court for the Eastern District of New York?

A. That is right here?

Q. No, that is over in Brooklyn.

A. Yes, sir.

Q. And you there testified?

A. Yes.

Q. On how many occasions did you appear before that grand jury?

A. Twice, I believe.

Q. Did Mr. Steinberg at any time prior to your appearing before that grand jury talk with you with reference to the testimony that you were to give?

A. No, sir.

Q. Specifically, I direct your attention to the time which is set forth, which is March 10, 1952, and ask you whether on that day, your answer is the same?

A. The answer is the same.

Q. And on that day or any other day or on about that day, because the indictment so states, did Mr. Steinberg unlawfully, and the other adjectives which I read which are in the indictment, intimidate you in connection with the testimony you gave?

A. No, sir.

Q. Were you ever threatened in any way?

A. No, sir.

Q. By telephone or any other way?

A. No, sir.

Q. Have you since learned or do you know, from what you know about this case, that Mr. Steinberg was in California——

The Court: Objection sustained.

Mr. Rosenblum: Well, he might know.

The Court: Even so, that is of no relevancy. You brought out the fact that he didn't even talk to him. Where Mr.

Steinberg was you can bring out by your own evidence.

Mr. Rosenblum: If I can get it from this witness, I can save time.

[fol. 79] The Court: Mr. Rosenblum, he said Mr. Steinberg never talked to him. Why not say did anyone else talk to you about your testimony, saying he was speaking for Mr. Steinberg?

The Witness: Shall I answer that?

The Court: Yes.

The Witness: No, sir,

Q. The answer is what?

A. No, sir.

Q. I was asked to ask the question, if I may, although I don't represent Mr. Scherm—although I have been accused of that—whether the same is true of Mr. Scherm?

A. That is right.

The Court: Mr. Scherm did not talk to you about any testimony you would give before the grand jury?

The Witness: That is right.

The Court: And nobody talked to you, saying they were speaking for Mr. Scherm with reference to that matter?

The Witness: That is right.

* * * * * * *

Q. How many years was your mind a blank on this $25,000 to $40,000 item?

A. Until shortly before this investigation, this indictment.

Q. For how many years was your mind blank? Do you remember before you gave me some years.

A. I would say about three years.

Q. Three years.

A. Yes.

Q. And this item came back to your mind in the latter part of 1954, is that right?

A. This is now February; the latter part of 1954, the beginning of 1955.

Q. Is that right?

A. That is right.

Q. And it is now about six years after the event that you allege?

A. This was 1948? That is about right.

Q. About six years after the event that you allege?

A. Yes.

[fol. 80] Q. And three years ago your mind wasn't as clear on that item as it is now?

A. That is correct, because I wasn't questioned about it.

Q. Well, do you want this jury to understand that you didn't honestly remember it for three years?

A. That is right.

Q. In fact, you didn't remember it for six years?

A. That is right.

* * * * * *

Q. What day did you bring that $25,000 to $40,000 over to Mr. Davis's office?

A. I put the time around August.

Q. What do you base that on?

A. I base that time on the fact that it took me that long to accumulate the money after the $16,000 payment that I told Davis it was going to take months for us to accumulate this.

Q. How many months did it take you to accumulate this money?

A. I would say about five or six months.

Q. Did you keep any record of the speed with which you accumulated this money?

A. No, sir.

Q. What did you do, carry the money in your pocket when you came over to Davis's office?

A. No, sir, I had it in a manila envelope, that red envelope similar to the first one.

Q. You say, in the light of what you have told us about this item, that you have a definite recollection now that you had it in an envelope and the color of the envelope and how it was wrapped. That you remember?

A. It was not wrapped. It was tied with a tape like one of your legal envelopes.

Q. You remember that now?

A. Yes, sir.

Q. That you recall?

A. That is right.

Q. Whom did you give it to, Hoffman or Davis?
A. Davis.
Q. That you recall, too?
A. Yes.

[fol. 81] Q. I want to ask you now whether or not she told the district attorney about this $25,000 to $40,000 payment when you didn't.

The Court: Objection sustained. He can't testify as to what she said if he was not there.

Q. Did she tell you whether she did or not?
A. She didn't.
Q. You had discussed the matter before you testified with Mrs. Segel?

The Court: Objection sustained, unless you define what you mean by "matter."

Q. The matter of the payments of cash. You had discussed that with Mrs. Segel before you went over to see Mr. Percy, as you told us just a few minutes ago?
A. Would you rephrase that question? I can't follow you.
Q. You told us a little while ago that after you obtained immunity, you and your partners and associates discussed the facts concerning the payments of cash in your tax problem, which you said you would tell the district attorney in exchange for your getting immunity?

Mr. MacMahon: Your Honor——
The Court: The witness has so testified.
Mr. MacMahon: That is not even a question.
The Court: What is the question, please?

Q. Then when you discussed it with Mrs. Segel and the others before you went there to see Mr. Percy, did a single one of them tell you or remind you or bring to your attention that there was a third payment of $25,000 to $40,000?
A. If they had, I would have remembered it and told them about it.

The Court: So the answer is what, that they did or didn't?
The Witness: They didn't.

[fol. 82] MAURICE SMITH, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. O'Hara:

Q. Mr. Smith, where do you reside?
A. 320 West 86th Street, New York.
Q. What is your occupation?
A. Certified public accountant.
Q. How long have you been a certified public accountant?
A. Since 1936.
Q. And under what firm names have you practiced accountancy?
A. Under the name of Maurice Smith, Stratford Audit Company, Lichtman & Smith; Roland & Smith.
Q. And are you the accountant for Pattullo Modes?
A. I am, sir.
Q. And the present name of that firm is what?
A. Pattullo Modes Jo Copeland, Inc.
Q. How long have you been an accountant for that firm?
A. Since 1942.
Q. Mr. Smith, has any promise been made to you in connection with any testimony you may give?
A. Yes, sir.
Q. And what promises have been made to you?
A. I was promised immunity from an indictment which is now pending against me and for any other matters in the Pattullo Modes or Pattullo Modes Jo Copeland case.
Q. Going back to early 1947 you were the accountant then for Pattullo Modes?
A. Yes, sir, I was.
Q. Do you recall whether or not the books of Pattullo Modes were audited during that year?
A. Yes, they were.
Q. By a revenue agent?
A. By Revenue Agent Scherm.
Q. Will you tell us when?
A. Around the beginning of 1947; early in January; again in February.
Q. Mr. Smith, what is your best recollection as to the length of time that the audit took?

A. About two days.

Q. Were you present?

A. All the time.

Q. You were present all the time that the agent was making the audit?

A. Yes, sir.

[fol. 83] Q. What if anything happened at the conclusion of the audit?

A. Mr. Scherm concluded his examination and presented a form 870 for the client to sign.

Q. And what was the purpose of this form 870?

A. An 870 is a paper that is prepared by a revenue agent which showed a result or resulting tax as a result of any disallowances of expenses.

Q. And on that form was stated the difference in tax?

A. Yes, sir. It shows the original tax and shows any additional tax and shows the total tax.

Q. After Mr. Scherm gave you form 870, what did you do with it?

A. I gave it to the client to sign.

Q. Did the client sign it?

A. Yes.

Q. Then what did you do?

A. It was given back to Revenue Agent Scherm.

Q. You gave it back to him?

A. Yes.

Q. Then did you have occasion to see Revenue Agent Scherm again in that same year?

A. Yes, sir. Well, I should judge a few weeks later Revenue Agent Scherm called me, came to see me at my office, and he told me that he had taken up the 870 with his superior and that he thought it was best that there be further disallowance of expenses.

Q. Did Revenue Agent Scherm tell you who his superior was?

A. Yes. Max Steinberg.

Q. And after telling you there should be a greater disallowance made, what if anything was done?

A. I brought the 870 to the client and he signed it, and I gave it back to him.

Q. That was for even a greater amount in tax?

A. Much larger.

Q. And that was signed, or do you recall how it was signed by the client?

A. No. It was either Mr. Marks or Mrs. Segel.

Q. Then did you return that to Revenue Agent Scherm?

A. Yes.

[fol. 84] Q. Do you recall when that was?

A. February, 1947.

Q. What was done with the first 870, if you know?

A. Revenue Agent Scherm destroyed it.

Q. The first 870?

A. Yes.

Q. Now, did you have occasion to see Revenue Agent Scherm again in 1947?

A. Yes, I did.

Q. And what was the occasion that you next saw him?

A. In May, 1947 Revenue Agent Scherm called me and he came to my office and he told me, "Mr. Smith, I have some sad news for you." He said, "There is a form 917 out on the firm of Pattullo Modes." Form 917 is an information form submitted as a result of the examination of another client of the firm of Pattullo Modes which discloses there were certain sales or certain income that was missing.

Q. Well, Revenue Agent Scherm told you he had a 917 on Pattullo Modes?

A. Yes, sir.

Q. What else did he say to you?

A. He said he would like to check to find out whether the sales or the income was recorded on the books of Pattullo Modes, Incorporated.

Q. And what was done about that?

A. I went with him up to 498 Seventh Ave.

Q. When?

A. That same day, immediately, and we examined——

Q. That is the address of Pattullo Modes?

A. Yes, sir. We examined the ledgers of Pattullo Modes, Inc., and none of the sales were disclosed on their books.

Q. Now, did you ever meet a man by the name of Katz?

A. Yes, I did.

Q. Will you please tell us the circumstances under which you met a man by the name of Katz?

A. Morton Marks called me one day to come over to the office, and he told me that he had gotten a call. I don't recall—I had seen someone by the name of Katz in this association. Mr. Katz who had known Morton said, "Morton, I understand your firm is in trouble. Send your accountant [fol. 85] around. I think that something can be done. And you ask him if—ask your accountant if he can recognize the initials M. S."

Morton Marks told me about it. I said, "Yes, the initials M. S. stand for Max Steinberg. He is Harry Scherm's group chief."

Q. Then what if anything did Mr. Marks say to you about Mr. Katz?

A. He said would I please go over to see Mr. Katz, because Mr. Katz is going to introduce me to somebody.

Q. Did you go to see Mr. Katz?

A. I did.

Q. Were you introduced to anyone?

A. Yes. Mr. Katz said meet someone by the name of Mr. Deutsch.

Q. Where did this take place?

A. At the office of Mr. Katz.

Q. After you met Mr. Deutsch what happened?

A. Mr. Deutsch asked me to come with him to the office of Schopick & Davis at 535 Fifth Ave.

Q. And did you go there?

A. I certainly did.

Q. Whom did you see there?

A. I met Milton Hoffman, and Irving Davis, at that time.

Q. Did you have a conversation with either one of them?

A. Yes, I did. I had a conversation with Milton Hoffman.

Q. What was the nature of that conversation in words or substance?

A. Milton Hoffman says, "I understand you are the accountant for Pattullo Modes and they are under tax investigation and in some tax difficulties."

I said, "Yes. How did you find out?"

He said, "I found out through the initials M. S., Max Steinberg."

He said, "I want you to know that this firm of Schopick & Davis can handle your client and save them from criminal prosecution, more especially from the fact that this case would now go down to 253 Broadway, the Fraud Squad."

Q. Mr. Hoffman said if the firm——

Mr. Singer: I object. There is no use repeating.

The Court: Let the witness testify.

Q. Was that the entire conversation?

A. No. He said, "Smith, you are privileged to bring this to any other attorney you want, but again I want you to know if we don't handle the case this case is going down to 253 Broadway." He said, well, he tried to sell me. He told me the office had handled some case in the midwest, a fraud case, and they had been very successful.

By the Court:

Q. Did he say to you that this was a fraud case?

A. Well, he threatened—he said, "This case is going down to 253 Broadway."

Q. Did he say anything to you about what the nature of the case was?

A. Yes. He knew about the 917, your Honor.

Q. Did you ever discuss this case with anybody else outside of your office up to that time?

A. No, sir.

The Court: All right, go ahead.

By Mr. O'Hara:

Q. At the conversation that you had were the names of any people in the Internal Revenue mentioned?

A. Max Steinberg.

Q. And in what connection was this name mentioned?

A. He said Max Steinberg was the group chief, which I knew, and that this case, while it was still under the surveillance of Mox Steinberg would still be up at 341 Ninth Avenue.

Q. Was there any further discussion of Max Steinberg at this meeting you are now relating?

A. I know he asked me would I meet Max Steinberg, which is something I had been trying to do.

Q. Did you say you would like to meet him?

A. I certainly did.

Q. What, if anything, happened as a result of that?

A. I don't know whether that day or a few days thereafter I went to the house of Max Steinberg with Milton Hoffman.

[fol. 87] Q. And where was that residence?

A. On West End Avenue, I think, in the 72nd or 73rd; somewheres around there.

Q. Was that an apartment house?

A. It was an apartment house. I went up with Milton Hoffman.

Q. You went to Max Steinberg's apartment?

A. Yes. I met Max Steinberg. I met Mrs. Steinberg, and I met another woman.

Q. What transpired there or conversation, if you can recall?

A. Well, when I went with Milton he was telling me about a coming engagement party of Max Steinberg's daughter, and from the conversation it seemed as though Milton Hoffman was running the entire affair.

When I went upstairs Milton introduced me as Maurice Smith, the accountant for Pattullo Modes. We went upstairs. We were in the apartment I don't think any more than about ten minutes. I congratulated Mr. Steinberg and Mrs. Steinberg on the engagement of their daughter. There were just sociabilities exchanged upstairs.

Q. Did you stay up there?

A. I don't think any more than about ten minutes.

Q. What happened next, if anything?

A. The suggestion was made, and I don't know whether it came from Max or Milton that we go downstairs to Milton Hoffman's car.

Q. Who went downstairs to Milton Hoffman's car?

A. The three of us.

Q. Well, name the three.

A. Milton Hoffman, Max Steinberg and myself.

Q. Did you go downstairs?

A. Yes, we did.

Q. What did you do after you went to that car?

A. Max and Milton sat in the front seat and I sat in the back. I don't think I was there for any more than ten or fifteen minutes. They exchanged sociabilities and the impending marriage of his daughter, and then they started to discuss the Pattullo Modes case.

Q. What discussion was there about the Pattullo Modes case?

A. Max Steinberg telling Milton Hoffman, loud enough [fol. 88] certainly for me to hear, that the case was under control, that it was still on his desk and that it was still at 341 Ninth Avenue.

* * * * * * *

Q. Mr. Smith, was there ever any discussion with you of voluntary disclosure?

A. Yes.

Q. Approximately when was that first discussed with you?

A. The latter part of 1947; Irving Davis spoke to me.

Q. Will you please tell us what it was that Mr. Davis said to you on that subject?

A. Irving Davis told me that the clients were subject to criminal prosecution, and that if I would make up a story with him that the clients had told me to disclose to the Bureau of Internal Revenue a voluntary disclosure, the clients would not go to jail.

Q. Had the clients told you to make such a disclosure?

A. Never did.

Q. What did you say to Mr. Davis about this request?

A. I went along. I wanted to save the clients. Here were people that I liked.

Q. The answer is that you went along. Is that right?

A. Yes, I did.

Q. What was it that Mr. Davis asked you to say about voluntary disclosure precisely?

A. He told me to say that I had mentioned to Revenue Agent Scherm, right after the examination, that I told him the clients had omitted income.

Q. Which examination?

A. The Federal Tax examination, and the last time after I gave him the 870.

Q. Which would have been approximately when?

A. Around February of 1947.

* * * * *

Q. What happened next after you said you would go along with this request?

A. I went down with Mr. Davis to see an attorney by the name of James Saver of the firm of Martin Schwaeber.

Mr. Rosenblum: May we have the time fixed?

[fol. 89] Q. When, to the best of your recollection, was that?

A. October or November of 1947 or December 1947, the latter part of the year.

Q. Whom did you see there?

A. I saw Mr. Saver and Mr. Schwaeber.

Q. Did you have a discussion with them about voluntary disclosure?

A. Yes.

Q. Was there anyone else with you?

A. Mr. Davis.

Q. He was there?

A. Yes, sir.

Q. What did you tell them?

A. I told them the story, which was a figment of my was not the truth.

Q. Following that conference, what is your next recollection of an event concerning voluntary disclosure?

A. Mr. Saver took me to 341 Ninth Avenue——

Q. When, please?

A. November or December of 1947.

Q. That is your best recollection?

A. Yes, the end of 1947—to see Mr. Ralph Wheeler, who was the Chief of 341 Ninth Avenue.

Q. You saw Mr. Wheeler?

A. I did. I had a conference with him.

Q. Who was present?

A. Just Mr. Wheeler and myself. Mr. Saver introduced me and walked out of the room.

Q. What did you talk to Mr. Wheeler about?

A. I told Mr. Wheeler about this so-called voluntary disclosure.

The Court: What did you say to him about the voluntary disclosure?

The Witness: I told him that I had informed Revenue Agent Scherm a few days after I had had the examination that something was wrong with the books of Pattullo Modes.

The Court: And that Pattullo Modes had not reported all their income on their income tax returns?

The Witness: Yes, sir.

Q. What do you recall Mr. Wheeler saying to you, if anything, about that?

A. Ralph Wheeler didn't tell me anything. He said he would let me know or let them know.

[fol. 90] Q. Whom did you next speak to with respect to voluntary disclosure, to the best of your recollection?

A. Mr. Davis, Mr. Saver, Mr. Schwaeber, Mr. Hoffman.

Q. When was that?

A. 1949, I believe.

Q. This would have been in 1949?

A. There were so many years went by.

Q. Take it back to the time you were in Mr. Wheeler's office.

A. Late in 1947.

Q. That was still in 1947?

A. Late in 1947. In October 1948, I think.

The Court: It was October 1948 when you next discussed this matter?

The Witness: Yes, sir, in great detail.

The Court: About a year later after your discussion with Mr. Wheeler?

The Witness: Yes, sir.

Q. Did anyone inform you of the result of your conference with Mr. Wheeler?

A. Yes, Mr. Davis. The next we knew the case on Pattullo Modes was going down to 253 Broadway.

The Court: What did going down to 253 Broadway mean to you as an accountant?

The Witness: It meant an investigation by the Intelligence Department. 253 Broadway is the Fraud Squad.

The Court: Where they handle criminal prosecutions. Is that what the inference is?

The Witness: Yes, sir.

Q. You have placed the date of your conference with Mr. Davis, Mr. Saver, Mr. Schwaeber and Mr. Hoffman, in what month of 1948?

A. October.

Q. What was that conference?

A. Well, I think I would have to go back a bit, Mr. O'Hara. Mr. Davis told me that the case was down at 253 Broadway, and that in order to save the clients again, he [fol. 94] said, from criminal prosecution, it would be necessary for me to sign an affidavit reiterating all the facts that I had given to Ralph Wheeler, that I had told him before the 917 came in, and that it was a voluntary disclosure by the client. Mr. Davis told me it was my case against Revenue Agent Scherm.

Q. Your case?

A. The case; the fraud case I meant.

Mr. O'Hara: May I have that answer read?

(Answer read.)

Q. Your case?

A. My word.

Q. What did you say to Mr. Davis about that?

A. I told him I would sign it.

Q. This was an affidavit under oath he was asking you to make?

A. Yes, sir.

Q. You understood the nature of it?

A. Yes, I did.

Q. What happened next with respect to voluntary disclosure after you signed this affidavit?

A. I got a call from Mr. Davis to go with a Mr. James Saver to see Mr. Baradell at 253 Broadway—Mr. Baradell

was acting group chief, I believe, of the Fraud Squad—to discuss the voluntary disclosure and my affidavit.

Q. Did you go there?

A. I went with Mr. Saver.

Q. Did you have a conference with Mr. Baradell?

A. I did.

Q. What was the nature of that conference?

A. Mr. Baradell questioned me quite closely about the affidavit as to the time, what I said to Scherm, and about the affidavit. But he didn't believe me.

The Court: You say he did not believe you?

The Witness: He didn't. That was the impression I got, your Honor.

Q. What happened next, to the best of your recollection?

A. I was called down again to 253 Broadway to meet Mr. Baradell.

[fol. 92] Q. May we have your best recollection as to the date?

A. I think it was a few weeks later perhaps.

The Court: Might I ask this on the question of dates: How soon after you had actually executed this affidavit, which is this exhibit, did you have your first conference with Mr. Baradell? Can you tell?

The Witness: I think within a month. It was very shortly thereafter.

The Court: Within a few weeks thereafter you had the second conference with Mr. Baradell?

The Witness: Yes, sir. In the second one, Revenue Agent Scherm was there and Revenue Agent Clayton from the Intelligence Department also. Again I was questioned about the affidavit, and I faced Revenue Agent Scherm and——

Q. You lied to his face?

A. Yes, sir.

* * * * * * *

Q. Mr. Smith, do you recall when you left the stand on Friday you were testifying about a certain check?

A. Yes, I do.

Q. The check to Mr. Deutsch?

A. Yes, sir.

Q. That incident occurred approximately when?

A. End of January of 1949.

Q. Were you further concerned with the Pattullo Modes tax case in so far as it affected the years 1942 to 1946 following that period of time, January, 1949?

A. Yes.

Q. What did you have to do with that matter following January of 1949?

A. I worked with Mr. Weisberg and Greenstein's office and with the special agent and the Internal Revenue Agent Scherm. There was a complete examination of the books of Pattullo Modes for the years 1942 to 1946, and a tax was arrived at by the Bureau of Internal Revenue.

Q. Did there come a time when you heard of a Congressional Committee?

A. Yes, sir.

[fol. 93] Q. Can you tell us when that was?

A. 1951.

Q. Approximately when in 1951?

A. I think it was in the summer of 1951.

Q. What did you hear about it and from whom?

A. I was told by Mr. Davis that a hearing or an investigation was being made by a Congressional Committee of Tax Frauds, and that there was a possibility that Pattullo Modes' tax fraud case would be reviewed.

Q. Did he have anything further to say to you about that?

A. Yes. He told me that if anyone came to see me about it, I was to refer to the attorneys, Schopick & Davis; I was not to answer any questions.

Q. Did you subsequently have occasion to hear again of this Congressional Committee?

A. Yes.

Q. From whom?

A. Mrs. Segel.

Q. What did she have to say to you about that?

A. She told me that a Mr. Shapiro was to see her and questioned her about the Pattullo Modes case.

Q. Following that, did you again have anything come to your attention in connection with a Congressional Committee?

A. Yes, sir, I received a piece of paper.

Mr. O'Hara: May I have this marked for identification, please.

(Marked Government's Exhibit 8 for identification.)

Q. What was that piece of paper that you received?

A. It was a subpoena to appear before the King Committee Congressional Investigation.

Q. I show you Government's Exhibit 8 for identification and ask you if you can tell us what that is, please (handing).

A. A subpoena to appear before a——

Q. I don't want you to describe the document. Can you tell me what it is.

A. A subpoena, a federal subpoena.

Q. Is that the subpoena you just testified about receiving?

A. Yes, sir.

[fol. 94] Q. That is the subpoena that you received in 1951 to appear before a Congressional Committee?

A. Yes, sir.

Mr. O'Hara: I offer it in evidence.

The Court: Any objection?

Mr. Aranow: I suppose that is being received subject to connection? Otherwise it is immaterial.

The Court: Yes, certainly. If there is no objection, it will be received subject to connection.

(Marked Government's Exhibit 8 in evidence.)

Mr. Singer: Is there a date on that subpoena?

Mr. O'Hara: Yes, it is dated August 16, 1951.

Q. Now, Mr. Smith, following the receipt of this subpoena, what if anything did you do?

A. We went to see Mr. Davis' firm——

Q. You say "we". Who is that?

A. Marjorie Segel and Morton Marks. I don't know whether Mr. Sam Cohen went. I went. From there, we went to see Mr. James Saver.

Q. Did you have a conversation with Mr. Saver?

A. Yes, Mr. Saver said that he could not represent Patullo Modes or myself before the King Committee, and he

recommended that we go to see the firm of Corcoran & Kostelanetz, Mr. Boris Kostelanetz.

Q. Did you do that?

A. Yes, sir, we did.

Q. What was the result of your conference with Mr. Kostelanetz so far as you were concerned?

A. Mr. Kostelanetz came with me before my investigations at the King Committee.

Q. Did you have any conversations with Mr. Davis aside from those that you had with Mr. Kostelanetz and Mr. Davis together?

A. Yes, I did.

Q. When were those conversations in relation to the date that you appeared before the Congressional Committee?

[fol. 95] A. Right before I went to appear before the King Committee.

Q. Who was present at that conversation?

A. Mr. Davis and myself.

Q. Just Mr. Davis and yourself?

A. Yes.

Q. Will you please tell us in words or substance the nature of that conversation?

A. Mr. Davis told me, one, that he would prepare a sentence or two whereby I was to claim client-attorney privilege as to all matters pertaining to any conversations that I had with Mr. Davis.

Q. In substance, what were you to say? What words were you to say in substance?

A. On any of those matters where I had anything to do with Mr. Davis, I was just to say that I cannot talk about anything pertaining to Pattullo Modes case since I was retained by the attorney. He also told me that I was to stick to my story that I had told to Mr. Baradell and had told to Mr. Ralph Wheeler, and to stick to my affidavit.

Mr. Gottesman: If your Honor please, I believe I am right in understanding that this is taken subject to connection?

The Court: Oh, yes. In this case all this testimony will have to be taken subject to connection because there are five defendants here, and the jury will understand that it only becomes binding on any defendant as there is a con-

nection established between that defendant and the person concerned as to whom the testimony is given.

Mr. Rosenblum: And I think it must be connected that there was a conspiracy and he became a part of it.

The Court: Yes. The court will so instruct the jury at the appropriate time. When I say connected, I use it in a rather loose sense.

Mr. Rosenblum: That fact must be proved in and of itself.

[fol. 96] The Court: That is correct, Mr. Rosenblum, and the jury will be instructed at the appropriate time. The jury will understand in this case that there is a lot of evidence coming in as to particular people when the defendants were not present, and it will be binding on the defendants only if the jury finds in effect that there was a conspiracy between these defendants and the person with whom these conversations were taking place and who were doing these acts. In that situation the jury, if they find that there was such a conspiracy and the conversations and the acts were part of the conspiracy or pursuant to the conspiracy, then the acts of one conspirator are binding on all conspirators in the course of the conspiracy, and you will understand the evidence as it comes along is taken subject to connection, and those ultimate questions will be submitted to the jury.

Go ahead.

By Mr. O'Hara:

Q. Mr. Smith, you were relating a conversation with Mr. Davis concerning your testimony before a congressional committee, is that right?

A. Yes, sir.

Q. And he had asked you to stick to your story?

A. Yes.

Q. And that story: Was it true or false?

A. Completely false.

Q. Did you subsequently appear before a congressional committee?

A. I did for three days.

Q. Where?

A. In New York. I believe it was in this building.

Q. Did you testify?
A. Yes, sir.
Q. Did you tell the story that was related in the affidavit?
A. Yes, I did.
Q. And the story you related to Mr. Baradell?
A. Yes, sir.
[fol. 97] Q. And you were under oath at that proceeding, were you not?
A. I was.
Q. What happened next?

Mr. Rosenblum: Who did he say told him to stick to his story?
Mr. O'Hara: Mr. Davis.
The Court: Davis.

A. I was arrested.
Q. Following your arrest——

Mr. Singer: Will you give us that date, please.

Q. Do you recall the date of your arrest, sir?

Mr. Rosenblum: The approximate date.

A. August 1951.

. . . . . .

Q. I show you Government's Exhibit 9 for identification and ask you if you can identify those two documents?
A. Yes, I can.
Q. What is it?
A. It is a subpoena to appear before the Brooklyn Grand Jury.
Q. Is that the subpoena that you received to appear before the Brooklyn Grand Jury?
A. That is the subpoena that my attorney received for me and told me about it.
Q. And it was pursuant to that subpoena that you appeared there?
A. Yes.

Mr. O'Hara: I offer it in evidence.
Mr. O'Hara: Anticipating an objection, your Honor, of course this offer is subject to connection.

The Court: Yes. Any objection?

Mr. Aranow: Subject to connection.

The Court: It will be received subject to connection.

[fol. 98] (Government's Exhibit 9 for identification received in evidence.)

Mr. O'Hara: I would just like to say that the date of the subpoena is February 28, 1952.

The Court: And calls for appearance on what date?

Mr. O'Hara: The 29th.

Q. Mr. Smith, following the time that you received this subpoena through your attorney, did you have any conversation with either Mr. Davis, Mr. Schopick or Mr. Hoffman?

A. I did. Revenue Agent Meehan——

Q. I asked you if you had a conversation with any of those three, and you mentioned a revenue agent.

A. I am sorry—yes, with Mr. Schopick.

Q. Would you please state the nature of the conversation that you had with Mr. Schopick?

Mr. Aranow: May we have the time?

Q. This is after the receipt of the subpoena and before you testified. Is that right?

A. That is right. Mr. Schopick came to see me at my office.

Q. Go ahead and tell us what happened when he came to see you at your office.

A. Can I tell the story of how he came about to my office?

Q. If you would indicate what the conversation was that Mr. Schopick had with you at your office, that is all I want at this moment.

A. Mr. Schopick told me that in my appearance before the Federal Grand Jury, I was to change my testimony as to the check of $500 that I had given Mr. Deutsch.

Q. Had you previously told anyone else the circumstances of the giving of the check to Mr. Deutsch?

A. Yes, I did.

Q. To whom had you told that, and when?

A. Federal Agents Meehan, Hulnick and I believe Mur-[fol. 99] ray had been to my office to make an investigation of my own books and that of my associate. During the

course of the examination they came across this check for $500 and they asked us about it and how we had treated it, and we told them the exact circumstances, that it was at the request of Milton Hoffman as a service fee for his brother-in-law, Mr. Deutsch.

Q. Incidentally, how was that treated on your books, that $500?

A. As an expense.

* * * * * *

Q. What was it that Mr. Schopick discussed with you? What was said?

A. He told me to tell them that the check that I had given to Mr. Deutsch was at the request of Milton Hoffman in the form of a loan. It seems that Milton Hoffman was always lending his brother-in-law money, and that if the check came from me to Mr. Deutsch, it would seem as though Milton Hoffman had to go out and borrow money to give his brother-in-law.

Q. Do I understand that that is what Mr. Schopick wanted you to say?

A. Yes, sir.

Q. Where was it that he wanted you to say this?

A. In the Federal Grand Jury in Brooklyn.

* * * * * *

By Mr. Corbin:

Q. Wasn't it in June 1947, you told us on your direct examination, that you had a talk with Davis and that he promised you 20 percent of anything he got from Pattullo-Modes?

A. Yes. We got a fee of 20 per cent for doing work.

Q. I didn't catch that.

A. A fee of 20 per cent for helping and assembling the work.

Q. I say, was it then that you agreed with Davis and he with you that you would share in what money he got to the extent of 20 per cent for what you might do?

A. Mr. Davis told us we would get a fee of 20 per cent [fol. 100] for assisting him and assisting Weisberg & Greenstein in getting the work up.

Q. Well, at that time in June when you made that deal with Davis did you still believe that what Davis was doing and proposed to do was also, to use the same expression, strictly kosher?

A. I didn't know what Davis was doing.

Q. What is that?

A. I didn't know what Davis was doing.

Q. Well, so far as you were concerned, then, Davis was acting and intending to act as far as you could see legitimately?

A. Yes. He was the attorney. He got another accounting firm to do the work and I was to assist.

Q. Well, did you ask what the other accounting firm that was to do accounting work was to get?

A. No.

Q. All you knew, you were to get 20 per cent of what Davis got?

A. Yes.

Q. And you believed, you say now, that Davis was to handle the matter in an up-and-up-on-the-level fashion free from any wrongdoing or anything of that sort, is that right or wrong?

A. Absolutely right.

Q. Now, when did you come to suspect for the first time that Davis was acting in any way improperly in any respect?

A. I would call it improper when he told me to tell about false affidavits, when he told me to lie before Ralph Wheeler?

Q. That was shortly after, wasn't it?

A. About six months.

Q. Well, was in the fall? This was in June? Was it October?

A. Or November.

Q. Or November?

A. Right.

Q. Now, do you want this jury to believe from your testimony today, at that time, the fall of 1947, October or November, was the very first time that you had any suspicion that Davis was up to any shenanigans?

A. Yes.

Q. You, then, an honest man without any suspicion of anything wrong, do you want us to understand in your testimony now, that you then became a dishonest man and went along with a dishonest scheme?

A. I do.

. . . . . .

[fol. 101] By Mr. Rosenblum:

Q. How old are you, sir?

A. 48.

Q. At that time you had how many years' experience in the business world?

A. About 25, 26.

Q. And you knew that an accountant's greatest asset is honesty, didn't you?

A. Yes, I did.

Q. And you decided to do a crooked thing like committing perjury?

A. I did.

. . . . . .

Q. Up to what year would you say that you received only your monthly retainer plus the addition for preparing income tax returns? What years did that cover?

A. I think until about 1948.

Q. Did you receive anything outside of your monthly retainer plus money for preparing income tax returns after that year?

A. Yes.

Q. And what was that?

A. In 1948 I think we got about $3,500 or $3,600.

Q. What was that for?

A. I think it was for a little over a hundred-odd man days spent exclusive of the audit in preparing and getting the figures together.

Q. That you were doing under your arrangement with Davis?

A. Yes. Both.

Q. And you got paid twice?

A. Yes, that is right. Both.

Q. And I think you said you didn't disclose what you got from Davis to Marks until a particular date?

A. 1949.

* * * * * *

Q. Could you tell us from your knowledge, if you know, how much Davis received in checks from Pattullo Modes for the business we have been hearing about now for the last week or so?

A. I think it was nearly $100,000.

Q. So you got $20,000?

A. No, sir.

Q. Didn't you tell us you were supposed to get 20 per cent of what Davis got?

A. Yes.

[fol. 102] Q. He cheated you?

A. I got $9,500.

Q. He cheated you?

A. I got $9,500.

Q. He cheated you?

A. No; maybe he still owes it to me. I don't know.

Q. Will you tell us how would you know whether or not he still owes it to you?

A. I know he owes it.

Q. Said maybe he still owes it to you.

A. He still owes it to me.

Q. When did you last ask him for it?

A. I haven't. I don't remember—I haven't asked him.

Q. Tell us, did you just get a check on a few occasions for making that false affidavit and nothing else?

A. No, sir.

Q. I thought you said you got stipulated monthly payments from Pattullo Modes and $3500 for the work you did for Pattullo Modes; and you say you got $9500?

A. Yes, $9500.

Q. And you had an agreement for 20 per cent?

A. I was told that.

Q. Who told you you had an agreement for 20 per cent?

A. Mr. Hoffman and Mr. Davis told me I would get 20 per cent of any fees they got.

* * * * * *

Q. By the way, have you ever had any other charges of any kind against you?

A. Yes.

Q. What were they?

A. When I was 21.

Q. All right. Now, tell us about that. In fact, I didn't know it. I think we ought to know.

A. It is something I haven't told my family or——

Q. What?

A. —my adopted children.

Q. What?

A. I never told anybody in my life except Mr. O'Hara. I told him not to ask if it were possible.

Q. Well, I won't press it at this time, if your Honor please. I may want to ask you later. Were you convicted of anything?

A. Yes.

Q. Will you give us in a few words what that was?

A. I was convicted of a crime and I got a suspended sentence.

[fol. 103] Q. What was the crime?

A. Forgery. When I was 21. I never told my wife, family or my adopted children.

. . . . . .

Q. By the way, in the light of the trouble that you told us you had, how did you get your CPA?

A. I signed the affidavit incorrectly, my application.

Q. You mean it was false, don't you?

A. Yes, sir.

Q. And the affidavit that you say you presented to Wheeler or to Baradell was also false, wasn't it?

A. Yes, sir.

Q. How did you get permission to practice before the Treasury Department of the United States?

A. In the very same manner, sir.

Q. Again you filed false documents?

A. Yes, sir.

Q. You wanted to achieve something so you testified falsely, didn't you?

A. I did, sir.

. . . . . .

Q. Do you recall your preparing a financial statement that was submitted to Miss Copeland's lawyer?

A. Copies of a statement that were submitted to Miss Copeland's lawyer.

Q. But who prepared it? Didn't you?

A. Yes.

Q. That was false by over $300,000, wasn't it?

A. It was a copy of the prior years.

Q. Was it false by over $300,000 or wasn't it?

A. Yes, sir.

Q. Did you know it was false?

A. Yes, sir, and we submitted——

Q. You submitted a copy. Was the copy any different than the original?

A. No, sir, it was the same.

Q. Was it false?

A. When we delivered it that year, I knew it was false.

* * * * * * *

Q. How much did you earn out of this deal all together?

A. We got $9,500 fee.

[fol. 104] Q. Well, how much did you get from Pattullo Modes?

A. We got $3,600 in 1948 and another $4,500 in 1949.

Q. How much?

A. $4,500.

Q. So you got close to $17,000 or $18,000?

A. That is right.

* * * * * * *

Cross examination.

By Mr. Singer:

Q. I think you testified at page 729 that you appeared before a Congressional Committee in this district—this was on direct examination—and you testified for three days. Is that correct?

A. Yes.

Q. You mean by that actually for three days you were on the witness stand before a Congressional Committee,

and counsel for the Committee was asking you questions about this Pattullo case? Is that right?

A. I was not on any witness chair. It was at a table.

Q. At a table?

A. Right.

Q. You had raised your right hand?

A. Yes.

Q. You had been sworn to tell the truth. Is that right?

A. That is right.

Q. Just as you were here in the courtroom?

A. Yes.

Q. For three days Government lawyers asked you questions about the Pattullo case?

A. Yes.

Q. And for three days you lied to them consistently and continually. Is that right?

A. I said that yesterday I did.

. . . . . .

Q. When you testified and lied face to face to Scherm, which appears in your direct examination at page 716, you said you did it to help your friends from going to jail. Isn't that so?

A. Yes.

Q. Isn't it also so that you did it without regard to what might happen to Scherm?

A. I would say yes at that time.

. . . . . .

[fol. 105] MARJORIE SEGEL, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. O'Hara:

Q. Mrs. Segel, where do you live?

A. 13 Cooper Road, Scarsdale.

Q. Are you connected with the firm of Pattullo Modes?

A. Yes, sir.

Q. And the name of that firm is presently what?

A. Pattullo-Jo Copeland, Incorporated.

Q. It was known by what name during the period 1942 to 1948, 1949?

A. Pattullo Modes, Incorporated.

Q. Were you an officer of that corporation?

A. Yes, sir.

Q. It is a corporation?

A. Yes, sir.

Q. What position did you hold?

A. Treasurer.

Q. Did you own any stock in the corporation?

A. Yes, I did.

Q. How much did you own?

A. 25½ per cent.

Q. That is of the common stock?

A. Yes.

Q. Did you own any preferred stock?

A. Yes, 50 per cent preferred stock.

* * * * * *

Q. Did there come a time when another firm of attorneys were engaged in behalf of Pattullo Modes?

A. Yes, sir.

Q. What was the name of that firm?

A. Saver & Schwaeber.

Q. And can you tell us approximately when it was that the firm of Saver & Schwaeber were retained?

A. It was early in 1948. I would say in the first few months of it. I don't remember the month.

Q. Can you tell us the circumstances of their retention?

A. Mr. Davis and Mr. Hoffman, one or the other or both, told us that their efforts to keep this case out of the fraud department had failed. It was now in the fraud [fol. 106] department, and they with our permission would like to engage this other firm of lawyers who had more experience in the fraud department than they did.

Q. And did you approve of that?

A. Yes, we did.

Q. And that is how they were retained, is that right?

A. That is correct.

Q. Now, did you subsequently empower those attorneys to appear for the Pattullo Modes Corporation and yourself before the Bureau of Internal Revenue?

A. Yes, sir.

(Paper marked Government's Exhibit 12 for identification.)

Q. I show you Government's Exhibit 12 for identification and ask you if you can identify that document?

A. Yes, sir.

Q. What is it?

A. It is a power of attorney for Saver & Schwaeber to be our attorneys.

Q. And that is the power of attorney you just testified to?

A. Yes, sir.

Mr. O'Hara: I offer it in evidence.

Mr. Singer: What is the date of it, please?

Mr. O'Hara: The date on this is March 31, 1948.

The Court: Any objection?

Mr. Singer: I object on the ground that there is no connection.

The Court: It will be received subject to connection.

(Government's Exhibit 12 for identification received in evidence.)

Q. Mrs. Segel, this document being dated March 31, 1948: can you tell us in relationship to that date, your best approximation of when it was that you retained Saver & Schwaeber?

A. Well, my best recollection is that it was shortly before that. I would say a matter of weeks, I think.

[fol. 107] Q. Subsequent to the retention of the firm of Saver & Schwaeber did you have occasion to meet Mr. Schwaeber or Mr. Saver?

A. Yes, sir.

Q. Which one did you meet?

A. I met both of them.

Q. Shortly after this power was signed did you have occasion to meet with either of those gentlemen?

A. I don't think it was short—I think it was certainly a month at least or possibly more.

Q. And at that time whom did you meet with?

A. With Mr. Saver and Schwaeber.

Q. Did you have occasion from time to time to discuss your tax matter with Mr. Saver and/or Mr. Schwaeber?

A. Just this one meeting.

Q. Just this one meeting?

A. Yes.

Q. That is the only time you ever discussed it with them?

A. Yes.

Q. Did there come a time when Mr. Davis or Mr. Hoffman spoke to you about the retention of anyone else in connection with your tax matter?

A. Yes.

Q. And when was that?

A. I think that was in 1949.

Q. Well, in 1948 do you recall whether or not there was anyone else suggested in connection with your tax matter by Mr. Davis and Mr. Hoffman?

A. I don't quite understand. Do you mean to engage other lawyers again?

Q. No. I said anyone in connection with your tax matter.

A. Well, after months had passed and nothing had happened and we were all getting very frantic, Mr. Davis or Mr. Hoffman said that there was somebody in their office who had a very good friend in Washington——

The Court: Were you present when he made that statement?

The Witness: Yes.

The Court: You were there?

The Witness: Yes.

The Court: All right, go ahead.

[fol. 108] A. (Continuing) —had a very good friend in Washington who he thought could be very helpful and get the thing through on a non-prosecution basis.

Q. Were any names mentioned to you in this connection?

A. Yes, sir.

Q. What names were mentioned, in that connection?

A. The name of the man in the office, Mr. Halperin.

Q. Now, after this money was taken did you have occasion to speak with Mr. Davis or Mr. Hoffman shortly thereafter?

A. Yes, I spoke to them.

Q. Did you have occasion to speak with Mr. Halperin?

A. Yes, I spoke to Mr. Halperin.

Q. When did you speak to Mr. Halperin?

A. Oh, it was probably several weeks after the money had been paid. We naturally were getting more and more nervous all the time, and I spoke to Mr. Davis or Hoffman over the telephone and said we were wondering when this would all be accomplished, and I was asked to come over to their office.

Q. Did you go over to their office?

A. Yes, I did.

Q. And who was present at their office when you went over?

A. Mr. Halperin was there with Davis and Hoffman. I think both of them were there.

Q. Can you tell us in words or substance the nature of the conversation which transpired on that occasion?

A. The substance of it was that all the arrangements had been made, that the no-prosecution deal would go through; we just had to wait until the proper—they had to wait until the proper time to get it through, but there was no doubt that it would be accomplished.

Q. Do you recall who told you that?

A. Mr. Halperin.

Q. Did Mr. Halperin say anything else to you on that occasion that you recall?

A. No, sir.

Q. Do you recall if he mentioned whether or not he had been to Washington?

A. Yes, he did say—that is how we knew that the arrangements were made.

[fol. 109] Q. Have you ever heard of circularization?

A. Yes, sir.

Q. In what connection have you heard of it?

A. I heard it during the time of our tax difficulties, that in certain kinds of tax examinations, letters are sent out to customers asking for their accounts with the firm.

Q. Did you ever have occasion to discuss circularization with either Mr. Davis or Mr. Hoffman?

A. Yes, sir.

Q. Can you tell us approximately when you had such a discussion?

A. Well, it was before this money situation—before we had given the money. I don't think it came out in the first part of all our dealings—in other words, in 1947—so I would say it was sometime in 1948, before we paid the money. That is about as definite as I can be on that.

Q. Will you give us in substance your conversation with either Mr. Davis or Hoffman on the subject of circularization?

A. We were told about this practice of circularizing customers, and that they were doing everything they could to prevent it. When they first told us about it, we told them what a terrible thing it would be for our customers if they received letters like that from the Internal Revenue Department.

Q. Who were your customers in general?

A. Stores, department stores.

Q. What type of store?

A. Saks Fifth Avenue, Bonwit Teller, Neiman-Marcus, that type of store, and specialty shops.

Q. Did you make any request to them in connection with circularization?

A. Yes, we asked them to please do everything they could to keep that from happening.

Q. Following the conversation, did you have occasion to discuss again the question of circularization with either Mr. Davis or Mr. Hoffman?

A. Well, we discussed it more than once. We would see them and we would say, "What have you done about it? Is it going to be all right?"

And they would say, "Yes."

I can't remember any particular time that they said, "It is definite that there will be no circularization."

[fol. 110] Q. To your knowledge, was there ever any circularization?

A. No, sir. To my knowledge, there was not.

Q. Have you ever heard the words "voluntary disclosure"?

A. Yes, sir.

Q. Can you tell us when you first heard those words, if you recall?

A. I first heard them at the time that Mr. Smith appeared before the King Committee and was arrested.

Q. You had never heard those words prior to that time?

A. No, sir.

Q. Going back for a moment to the events immediately following the conference with Mr. Davis, Mr. Hoffman and Mr. Halperin, following that, do you recall whether or not there were any revenue agents on your premises?

A. Yes, sir, there were.

Q. Do you know who they were?

A. Well, I know now who they were, yes—I don't know whether I knew then or not—Mr. Scherm and Mr. Clayton.

Q. In connection with their being there, did you have any conversations with either of the gentlemen?

A. No, sir.

Q. Did you ever have a conversation at any time with Mr. Clayton?

A. Yes, I did.

Q. When was that?

A. Well, it was in early January we were asked to come down to 253 Broadway to sign statements of what we had done.

Q. Who asked you to do that, Mrs. Segel.

A. Mr. Davis.

Q. What, if anything, did he say in that connection?

A. He said that the no-prosecution word was coming through, but that this signing of these confessions had to be done before.

Q. Did you go down to Mr. Clayton's office?

A. Yes, sir.

Q. Who went with you?

A. Mr. Marks, Mr. Cohen, my brother, Mrs. Bellet I think, and Mr. Davis.

Q. Did you have a conference with Mr. Clayton there?

A. Well, I don't know that it was a conference. I think

[fol. 111] he just told us that these papers had to be signed if we wanted to sign them.

Q. Did you sign something there?

A. Yes.

Q. Did you understand that you were signing that under oath?

A. Yes, sir.

. . . . . .

Q. Now, this document is dated January 4, 1949. Is that the date on which you signed it to the best of your recollection?

A. Yes.

Q. And following the signing of the statement with Mr. Clayton what happened next with respect to your tax matter?

A. Well, I think the following week we were told to go down to Mr. Baradell's office at 253 Broadway.

Q. Excuse me. You say "we were told." Will you please tell us who "we" is and by whom you were told.

A. Yes. Mr. Marks—Mr. Davis told Mr. Marks and me and Mr. Cohen and my brother James and Mrs. Bellet that we were to go down to 253 Broadway and Mr. Baradell would then tell us that there would be no prosecution.

Q. And approximately how long after you signed the affidavit with Mr. Clayton would you say that this conversation occurred?

A. It seems about a week.

Q. About a week later?

A. I think so.

Q. After this conversation did you go to 253 Broadway?

A. Yes, sir.

Q. And who went?

A. Marks, Mr. Zipser, and Mr. Cohen, Mrs. Bellet, myself and Mr. Saver.

Q. Mr. Davis wasn't there?

A. No, sir.

Q. Had Mr. Saver spoken to you about being there?

A. No, he had not.

Q. Had anyone told you that Mr. Saver would be there on that day?

A. Yes. Mr. Davis told us that Mr. Saver would be there as our representative.

Q. Did he say anything else to you about Mr. Saver on that occasion?

A. Yes. He said that Mr. Saver did not know anything about how this result was accomplished and that we were [fol. 112] not to say anything, to let him believe that it was through his efforts.

Q. Now did you meet with Mr. Baradell?

A. Yes, sir.

Q. What transpired at that meeting?

A. Mr. Baradell told us that we had broken the law, we had done a very bad thing, and that he was going to let us off this time because we had cooperated with the Government, and there would be no prosecution.

* * * * * * *

Q. Now, did there come a time, Mrs. Segel, when you met a man by the name of Shapiro?

A. Yes, sir.

Q. Can you tell us when that was?

A. It was in August of 1951.

Q. Will you tell us the occasion on which you met him?

A. An investigation, a tax investigation had started in Congress and he as a representative of this committee came to call on me.

Q. Prior to the time you met Mr. Shapiro had you had any occasion to hear anything about a congressional investigation?

A. Yes, sir.

Q. And when was that and who told you?

A. Well, several weeks before that or possibly a month Mr. Davis told me, told Mr. Marks and me and Mr. Cohen probably that this investigation was going on or about to go on and that not to worry about it, that it probably would come to nothing, but that if anybody came to ask us any questions, to refer him to Mr. Davis.

Q. When Mr. Shapiro came to see you did he identify himself to you?

A. Yes.

Q. How did he identify himself?

A. He showed me something in the form of a letter, I believe, something that told that he was connected with this House committee.

Q. Did he question you?

A. Yes, he did.

Q. And what did you tell him?

A. I told him about when we first heard of our tax difficulties and how we came to hear it. In other words, that [fol. 113] Mr. Smith heard about it and he told us. He wanted to know whether Mr. Smith had been aware of these things that we were doing and I said no—excuse me, did you ask something?

Q. No, no, go right ahead.

A. He asked how we came to the firm of Schopick & Davis and I think I said they were recommended by friends or by somebody. I didn't tell him.

Q. You didn't tell him the facts?

A. No, I did not.

Q. What did you tell him about how you first gained knowledge that your firm was the subject of investigation?

A. That Mr. Smith had gotten word—I don't know whether I said from whom—that we were under investigation and he told me. That is how I first knew it.

Q. Well, specifically did you tell Mr. Shapiro who it was that Mr. Smith had gotten his information from?

A. I really don't remember that.

Q. Following the conversation with Mr. Shapiro what if anything did you do?

A. Well, as I was getting towards the end of the conversation, all of a sudden I realized that Mr. Davis had told me not to speak to any representatives. Why I did I don't know. And so, I called him.

Q. Excuse me; was there anything else that Mr. Shapiro wanted from you at the time that he spoke with you?

A. He asked to see the records, our records on some point—something about a payment to Davis or something like that, and I said that I did not want to show the records without having an accountant, our accountant there. So he said he would be back later on.

Q. Did Mr. Shapiro come back later?

A. No, he did not.

Q. Did anyone else come back later?

A. Yes.

Q. Now, between the time that Mr. Shapiro was there and someone else was there you say you had a conversation with Mr. Davis?

A. Yes, I did. I saw him.

Q. You saw him personally?

A. Yes.

Q. Were you alone on that occasion?

A. Yes.

Q. Will you please tell us what the substance of that conversation was with Mr. Davis?

[fol. 114] A. The substance was that he had told me I should not talk to anybody. "Why did you do it?"

I said, "I don't know why I did it. I did. I am sorry. I shouldn't have."

And he asked me what I had said and then said, "If anybody else comes back, be sure and not talk any more."

I went back.

Q. This someone else who came to see you, I take it it was the same day. Is that right?

A. Yes.

Q. Did he identify himself?

A. I don't really remember. He must have I suppose. You mean with a physical identification?

Q. No—

A. He told us who he was, if that is what you mean.

Q. What did he tell you?

A. That he also was from this investigating committee.

Q. What was your conversation with him, please?

A. He had a typewritten paper which was supposed to have been an account of my conversation with Mr. Shapiro, and he asked me to sign it.

Q. Did you sign it?

A. No, sir.

* * * * * *

Q. Do you know whether or not Mr. Smith was subpoenaed by a Congressional Committee?

A. Yes, sir.

Q. Did he tell you that?

A. Yes.

Q. Do you know whether or not he appeared before a Congressional Committee?

A. Yes, sir, he did.

Q. Do you know what happened, if anything?

A. Yes.

Q. With respect to his appearance before that Congressional Committee?

A. I know that at his apperance he was arrested for having committed perjury. That is what happened.

Q. When was the next time you saw him after that?

A. Mr. Smith?

Q. Yes.

A. That night at his home.

Q. Will you tell us in substance what your conversation with Mr. Smith was on that occasion?

[fol. 115] A. Well, the substance of it was, "Why did you do it?" His answer was, "That was the only way you people could be gotten off." We didn't go into the detail. He was naturally very upset and his wife was very upset, and we all were, and it was just a question of being up there to make him feel better if possible.

Q. Approximately what would be the date of your visit to Mr. Smith?

A. Early in September, I believe was the date or late in August. It was just before Labor Day, I remember that.

The Court: What year was that?

The Witness: In 1951.

Q. Following the time that you saw Mr. Smith, did you have any further conferences with Mr. Davis or Mr. Hoffman?

A. None with Mr. Hoffman that I recall; some with Mr. Davis.

Q. What was the nature of those conversations?

A. The nature of them was what was going—of course, at this time we had retained Mr. Kostelanetz, so that we weren't taking advice from Mr. Davis at this point. We just used to talk to him to really try and find out what he thought was going on.

Q. Did he make any report to you on what was going on?

A. Every now and then he would say, "Oh, don't worry, nothing is going to come of it; it will all blow over" or things to that effect.

Q. Did he ever state to you the source of his information or knowledge?

A. He once, as I recall, said that Mr. Halperin had been in Washington and he was asking around and he didn't think anything would come of it.

Q. Did there come a time when you appeared in the United States Attorney's office in Brooklyn?

A. Yes, sir.

Q. Can you tell us approximately when that was?

A. I think it was in February or early March of 1952.

Q. At that time had any promises been made to you by the United States Government?

A. Yes, sir.

[fol. 116] Q. Reverting a moment to previous to this time, had you had any conversations with Mr. Davis with respect to any negotiations for such a promise?

A. Yes, sir.

Q. Do you recall on how many occasions there was such a conversation?

A. There may have been more than one, but I just recall one specific conversation on that subject.

Q. Approximately how long would you say that that conversation occurred before you appeared in the United States Attorney's office in Brooklyn?

A. A very short time, within a week, I would say.

Q. Were you under subpoena at this time any place?

A. We had already been subpoenaed before the King Committee. You are not counting that?

Q. You had been subpoenaed before the King Committee?

A. And had appeared.

Q. That was in what year?

A. 1951.

Q. Had you appeared?

A. Yes, sir.

Q. Did you testify?

A. No.

Q. Did you claim privilege?

A. Yes, sir.

Q. We are now talking about 1952. Is that right?

A. Yes.

Q. At this time in 1952, had you been subpoenaed before any governmental body?

A. Oh, yes, we had been subpoenaed by the attorneys in Brooklyn.

Q. By the United States Attorney in Brooklyn?

A. By the United States Attorney in Brooklyn.

Q. Before whom were you to appear, if you know, with respect to that subpoena?

A. Well, you mean the names of the——

Q. No, I am asking you if there was some governmental body you were subpoenaed before.

A. Yes, the grand jury.

Q. The grand jury in Brooklyn?

A. Yes.

Q. At the time that yo had these conversations with Mr. Davis, do you know whether or not you were at that time under subpoena?

A. Yes, this one conversation. I know that.

[fol. 117] Q. What was the nature of the conversation you had with Mr. Davis with respect to negotiations for immunity?

A. Well, Mr. Kostelanetz and Mr. Bernstein had gone down to Washington to make or try to make these arrangements. Mr. Davis knew about it, had been told I guess by Mr. Kostelanetz, and seemed very happy about the whole thing——

Q. Mr. Davis seemed happy about it?

A. Yes, and I couldn't quite understand why Mr. Davis should be happy about it because obviously if we got this promise of immunity, it meant telling the truth, and it seemed rather strange that Mr. Davis should be happy about anything like that. But as it turned out in the conversation, Mr. Davis didn't think we were going to tell the truth.

Q. What did he say?

A. Well, I don't remember exactly what he said that made me know that he expected us to lie, but I remember my answer was to the effect that, "You don't expect that

we could get up there and testify like that, do you? How could we get away with it?" Or something to that effect. He said, "Oh, don't worry about it. It is easy." Those aren't the exact words. That was the idea. That was pretty much the substance of that conversation.

Q. You have stated previously that you on occasion talked with Mr. Davis on the telephone?

A. Yes.

Q. About this case?

A. Yes.

Q. In these conversations on the phone, did you have any discussion as to conversations that you might have on the telephone with Mr. Davis?

A. I am sorry, I didn't quite get that.

Q. In connection with telephone conversations that might be had with respect to this case, did Mr. Davis ever discuss with you the matter of discussing this case with him on the telephone?

A. Not during all proceedings beforehand, but after all this started with the King Committee investigation, he did say that he thought it was advisable if we didn't discuss things on the telephone.

[fol. 118] By the Court:

Q. You said to Mr. Davis that you would not give certain testimony because he couldn't get away with it, something like that. What was the testimony you were talking about?

A. False testimony.

Q. Well, what kind of false testimony?

A. Well, after all, I knew that all these facts that I knew would be very damaging.

Q. Well, what facts? I mean, did he tell you anything that you were to tell or not to say or what caused that outburst on your part that you wouldn't give testimony?

A. Because I knew all of the wrong things we had done and knew that he would be certainly in great jeopardy if we ever told these things. That is why I couldn't understand how happy he was.

The Court: Maybe Mr. O'Hara will bring it out. For somebody to say, "I am not going to testify that particular

way" indicates that Mr. Davis must have had some conversation about the kind of testimony.

The Witness: I am sure he did.

The Court: All right now, Mr. O'Hara, you carry on from there.

By Mr. O'Hara:

Q. Mrs. Segel, can you give us in substance what it was that Mr. Davis said to you about testimony which occasioned the remark you just testified about?

A. Well, yes, I know what the substance was. What I said was, I couldn't remember how he put it, that we should lie, but the substance of it was that we should.

The Court: In what respect?

The Witness: About all the things that we had done wrong in this case.

. . . . . .

[fol. 119] Cross examination.

By Mr. Singer:

Q. Was your conscience at all disturbed when you were signing these false oaths on your income tax returns?

A. At times, yes.

Q. But never so much disturbed that you didn't continue to do it. Is that right? That is, continued to sign these false oaths on income tax returns?

A. That is correct.

Q. Never so much disturbed that you wouldn't continue to lie to Mr. Smith, who was the accountant working for you?

A. Right.

Q. Was it the money that sort of eased these little pangs of conscience as they appeared sometimes? It was the money, wasn't it? It sort of eased it up?

A. Yes.

Q. You did the whole thing for money, didn't you?

A. Yes.

Q. No question about that?

A. That is correct.

Q. The pangs of conscience, if you had any, didn't bother you much during 1948 because you were still putting money in the box even though you were not going to keep it for yourself, as you said. Isn't that right?

A. Yes, except that I can't say we weren't bothered.

Q. You were bothered; not enough yet, however, to want to surrender the possibility that this money you were putting in the box might free you from the sins that you had previously committed. Isn't that it?

A. We were desperate enough at that point to do it, yes.

Q. Desperate enough in 1949 to continue to do it?

A. Yes.

Q. Desperate enough to continue it in 1950 and 1951?

A. That had to be done.

Q That had to be done, and what had to be done, you and the others in this little group were willing to do. Isn't that it?

A. We did it.

Q. I know you did it, but you were willing to do it because it had to be done?

A. That is correct.

[fol. 120] Q. Willing to do if even though right in your office was sitting Clayton, a special agent, checking your books and records. Isn't that right?

A. Yes, sir.

Q. Did you ever have a talk with your partners and say to each other in substance, "Gosh Almighty, this is pretty nervy to continue to steal from the Government while its very agent, Special Agent Clayton, is sitting in our showroom or in our office working on the books"? Did you ever have such a talk among yourselves?

A. I don't remember any talk quite like that.

Q. Didn't you ever have a talk with each other—I am talking now of your partners, your brother and the others—about what a desperate situation it was and how much courage it required to steal while the Government had its agents watching you?

A. It wasn't a question of courage. We felt that was the only thing we could do at that point.

Q. And whatever it was, if that was the only thing to do to save yourself, you did it?

A. Yes.

Q. That feeling is still there today; whatever is necessary to save yourself, you do. Isn't that right?

A. That is why I am telling the truth here.

Q. That is why you are here now. That is the truth, isn't it? That is why you are here, to save yourself?

A. Yes, and that's——

Q. And of course——

The Court: Let the witness finish.

Q. Go ahead and answer it. And to tell the truth?

Mr. O'Hara: Your Honor, I ask to be heard on this.

The Court: I will ask that the question be re-read and then the witness will be given an opportunity to answer it.

(The stenographer read back the following question: "Q. That is why you are here now. That is the truth, [fol. 121] isn't it? That is why you are here, to save yourself?")

The Court: What is the answer?

A. The answer is that that is why I am here, and I know now that the only way I can save myself is to tell the truth.

Q. That is another desperate method to get out, by telling the truth? Is that it?

A. It isn't desperate.

Q. Still to this very day it isn't the calling of conscience to cleanse your soul that is disturbing you. That didn't play any part in this idea of telling the truth, did it?

A. The idea of telling the truth was brought to us, and we were very happy to accept it.

Q. I know, but, my dear, conscience fits into this somewhere, doesn't it?

A. Yes.

Q. You know the difference between right and wrong, don't you?

A. Yes, sir.

Q. You realize, don't you, that the cleansing of the soul becomes important as well as the safety of the body at times, don't you?

A. Yes, I do.

Q. But the safety of your soul never disturbs you; it was the safety of your body, the idea to get out of trouble

that made you come and say you were going to tell the truth, isn't that so?

A. As I said before the idea was brought to us by our attorneys.

* * * * * * *

Q. Let us see: There came a time when Mr. Davis started to ask for $150,000. You remember that, don't you?

A. Yes, sir.

Q. When was that?

A. Late in the summer. Possibly September.

Q. Let us take that date, whether it was late in the summer or possibly September: Up to that time you had had no conversations directly with Mr. Halperin?

A. That is correct.

[fol. 122] Q. That is what I am talking about. Now, you had a talk with Davis and Hoffman, you and Marks, about $150,000 or $100,000?

A. That is correct.

Q. So again Mr. Halperin was not present?

A. That is right.

Q. Now, some time went on and there was, well, bickering or bargaining about the amount?

A. Yes.

Q. And still every time you were bickering or bargaining, you and Davis and Hoffman, Halperin was not there?

A. That is correct.

* * * * * * *

Q. I think we can fix that date as sometime around November 18th or something like that?

The Court: The date of what?

Q. The date when Clayton first came into your office. If you did, that would bring this $100,000 incident, if it was six weeks back to around the end of September or the first week in October. Is that correct?

A. If November 18th is the date. I can't say whether it was or wasn't.

Q. I think you testified—and if I am in error please correct me—that it was sometime after you saw this $100,000

in your office that you spoke to Mr. Halperin for the first time. Is that right?

A. Yes, sir.

Q. Would you fix that talk when Mr. Halperin was there before Mr. Clayton came to Pattullo or after Mr. Clayton came to Pattullo?

A. Before.

Q. Is this an incident that you really remember or is it just——

A. The incident of my conversation?

Q. No, of Mr. Clayton coming to your office.

A. No, I don't remember any specific day he came in.

Q. So when you say "before," you are really guessing about it?

A. No, because I know that nothing was done as far as our books were concerned before my conversation with Mr. Halperin.

[fol. 123] Q. Finally, there did come some times in this six-week period—you know the six-weeks' period I am speaking of?

A. Yes, sir.

Q. Before you say you saw Mr. Clayton for the first time and the time you saw the $100,000 in your office.

A. Yes, sir.

Q. Sometime in this six-weeks' period you saw Mr. Halperin for the first time? At least you spoke to him for the first time?

A. Yes.

Q. If I am incorrect, tell me. Did Mr. Halperin speak then or was it Mr. Davis speaking?

A. My best recollection is that Mr. Halperin spoke. They both did. I don't mean that Mr. Davis didn't speak at all.

Q. Was Mr. Marks with you on this occasion?

A. No, sir.

Q. This is one of the times when you say you went there alone?

A. Yes, sir.

Q. It was then that you say that Mr. Halperin said that everything was all right, there would be no criminal prosecution. Is that what you say he said now?

A. I said that he said all the arrangements had been made.

Q. And that there would be no criminal prosecution?

A. I don't remember those words, but that is what the subject of the conversation was.

Q. I wish you would try to remember the words.

A. I am sorry, I couldn't——.

Q. So the best you have on this conversation is this faint recollection of the subject?

Mr. O'Hara: I object to that.

The Court: Tell us what your best recollection is.

Q. I have asked you for your best recollection——

Mr. O'Hara: No one has testified to a faint recollection of this event.

Mr. Singer: You say she hasn't. I say she has said she has a faint recollection.

[fol. 124] The Court: She said she couldn't give the words. Let us ask her what her best recollection is.

A. I have a definite recollection of this meeting. The substance of the conversation was that the arrangements had been made with the man in Washington and everything was going to be all right.

Q. This is your recollection of the substance?

A. Yes, sir.

Q. Do you remember the word "arrangements" being used, or is that your interpretation of what was said?

A. I said I gave you the substance. I can't say that was the word.

Q. That won't answer me. I want to know whether Mr. Halperin or anybody in his presence used the word "arrangements."

A. I can't answer that.

Q. So that is your interpretation?

A. Yes.

Q. Was there a name mentioned?

A. No, sir.

Q. But the word "Washington" was used. You remember that?

A. Yes, sir.

Q. You remember the word "man" being used?

A. Yes, sir.

Q. And you remember the phrase "man in Washington"?

A. Yes, sir.

Q. And that was all you remember of the conversation, what you have told us about?

A. Yes, sir.

Q. I want to give you an opportunity to enlarge on it, if you can. Can you think of anything else that you haven't told Mr. O'Hara and you haven't told anybody else up to now that you can think of that was said then?

A. The conversation certainly lasted more than the two minutes that I have taken to give it, but I have given you the substance. I can't remember any words. This was six years ago or whatever it was.

The Court: Did you ask questions, for example, and did they respond? That is what Mr. Singer means.

[fol. 125] The Witness: Yes. I asked, "Well, when is this going to happen?" And I was told by Mr. Davis or Mr. Halperin that these things take time, that at the proper time it would be done, but not to worry about it, it would be done. That is the substance.

Q. Stopping on this subject, the part you have added now in response to his Honor's quite proper question as to whether you asked questions and whether they made answers, have you ever told that to anyone before?

A. This conversation?

Q. This part of it that you have just repeated in response to his Honor's question.

A. Yes, sir.

Q. Where did you say that before?

A. I said it to Mr. O'Hara.

Q. Did you say it to the Brooklyn Grand Jury?

A. I don't recall whether I said that particular part of it.

Q. Do you remember whether you were asked to tell every single thing that happened when Mr. Halperin was in the room?

A. Yes, sir.

Q. Did you say what you have said here now when you were telling, as you say, the truth before the Brooklyn Grand Jury?

A. I gave the substance of the conversation as I remembered it.

Q. Were you asked specifically to try to remember who said what, what each person said and what each person did, if anything?

A. Whatever I was asked, I answered to the best of my recollection.

Q. But you don't remember saying anything like you have said now, this last part?

A. I might have and I might not. I don't recall.

Q. You don't have any recollection of it?

A. No.

Q. So that you made a statement anyway before a stenographer in Brooklyn before you went to the grand jury. Do you remember that?

A. I didn't go before the grand jury in Brooklyn.

[fol. 126] Q. So what you said in Brooklyn was before a stenographer?

A. A stenographer was there part of the time.

Q. It was written down and you were asked questions by Mr. Percy. Is that right?

A. I think so, yes.

Q. And you were making the answers, telling him as best you could what you remembered?

A. Yes.

Q. Would you say that you told Mr. Percy, or whoever else was asking you, the date when this meeting took place between you, Hoffman or you, Davis and Halperin?

A. I am sure I couldn't have given them a date.

Q. When I speak of the date, I mean the time.

A. I believe that I did.

Q. Do you think you fixed it at about the same time you did here?

A. I think so.

Q. You have no recollection on that?

A. I have just been telling things as I remember it, so I assume I said the same thing then.

Q. You would say each time you tell them, you may remember something that you had not remembered before?

A. Details possibly.

Q. That has been happening all along?

A. Yes.

Q. Strangely how things come back when your recollection is refreshed. Isn't that right?

A. Yes.

Q. Somebody suggests something and then you remember it. I am not suggesting that it isn't true, but isn't that the way it is done?

A. The more you think about something, yes.

Q. And the more you talk to other people who were present, the more you remember. Isn't that right?

A. Well, there was nobody else present in this particular case.

Q. Oh, Mr. Davis was present?

A. I haven't spoken to Mr. Davis.

Q. You haven't spoken to him since when?

A. Since before we went to Brooklyn.

Q. Which was in February of 1952?

A. Yes.

Q. So that the last time you discussed it with him was in February of 1952?

A. I never discussed it with him.

[fol. 127] Q. The last time you spoke to him?

A. The last time I spoke to him.

Q. You know you did discuss things with him in February 1952. You testified on direct examination that you did.

Mr. O'Hara: Excuse me, the question was "discuss it" and I assume "it" means this particular event. I think the other question is improper.

The Court: Will you clarify it?

Mr. Singer: In that regard you are correct, Mr. O'Hara.

Q. But you did discuss some incidents in connection with this matter?

A. No, we didn't discuss any specific incidents. We discussed the whole question of telling the truth or not telling the truth, no incidents.

Q. I am not concerned with anything you did with Mr. Davis. You then saw Halperin this once?

A. That is right.

Q. Did you see him again after this incident that we have been speaking of?

A. I had seen him in the office after that.

Q. Did you ever discuss anything concerning this matter, this Pattullo case, with Mr. Halperin at any other time?

A. No.

Q. I notice in the testimony that there was something about circularization. Do you remember that?

A. Yes.

Q. You never discussed that when Mr. Halperin was there, did you?

A. No.

Q. So any transaction or discussion about circularization, that was with Davis and Hoffman, wasn't it?

A. Yes, sir.

Q. Have I your complete answer, unchangeable, that the only time and the single time that you saw Halperin was this time you have related, during this six-weeks' period that you discussed this matter. Is that right?

A. To the best of my recollection, yes.

[fol. 128] Q. That is all you can give us. You are telling us the truth. And the only things that happened there were the things that you have described here on direct and cross examination?

A. Yes, sir.

Q. Once and once only?

A. Yes.

* * * * *

By Mr. Rosenblum:

Q. Do you recall, Mrs. Segel, talking about one of the three items that we discussed before when you said money was needed to avoid somebody tipping the applecart? Do you remember that?

A. Yes.

Q. When was that conversation?

A. Sometime in 1949.

Q. What part, would you say?

A. I would say March, April and May.

Q. March, April and May?

A. Yes.

Q. That is your best recollection?

A. Yes.

Q. Of the time?

A. Yes.

Q. And that you said was in connection with the fixing of the civil liability?

A. With the settlement of the whole civil liability. I don't think it was so much a matter of fixing the figures so much as the fact that when these things go through there are other people who work on them, and that nobody should raise a fuss about the phony deal that had been put through. I think that was the idea of not upsetting the applecart rather than the saving of taxes.

Q. You say phony deal which was put through: Is that no-prosecution you testified about?

A. Yes.

Q. Please tell me, answer my question with reference to tipping the scales in regard to fixing the civil liability that you talked about in your direct examination.

Mr. O'Hara: Excuse me, tipping the scales——

The Court: She didn't say tipping the scales.

Q. Tipping the applecart, I mean?

A. Well, what I meant by that is, as I understood, [fol. 129] what I understood that to mean was, in the process of settling the civil liabilities other people are working on them, other than the ones who were in the no-prosecution thing, and that these would have to be taken care of too so they wouldn't upset this verdict of no-prosecution.

Q. Are you saying to this jury now that the people who were working on fixing the civil liability would upset the verdict of no-prosecution?

A. We always felt that it could be if somebody said something to somebody.

Q. Who said to who?

A. Well, after all, we knew that this thing that had been done, this no-prosecution, was something that was not legal, I mean, not according to propriety, and therefore, since it wasn't done properly, it could be upset by anybody who wanted to be unfriendly.

Q. You testified on your direct examination that it was

to avoid someone tipping the applecart with reference to fixing of the civil liability. Do you remember that?

A. I don't remember using those words. If I did, it was all in connection with the civil liability, yes.

Q. And the fixing of an amount. You knew, did you not, at that time——

Mr. O'Hara: Well, your Honor, do we have a question or don't we?

Mr. Rosenblum: I will withdraw it and put a question to the witness.

The Court: Yes.

Q. You knew you had reached a point where you were assured that there was no prosecution?

A. We had been assured that, yes.

Q. You were told that?

A. Yes.

Q. That that was the decision?

A. Yes.

Q. Is that right?

A. Yes.

Q. What was left then was fixing the civil liability?

A. Yes.

Q. Isn't that right?

A. Yes.

[fol. 130] Q. And in that regard was the tipping of the applecart in connection with making your liability too high?

A. I think it was a combination of both.

The Court: Both what?

The Witness: The fact that we didn't want anyone to upset the decision that had been made and also on settling the amount as best they could.

* * * * * *

Q. You know, do you not, that the amount of the civil liability which was assessed against you was so high that you hired other lawyers to have it cut?

A. Yes, sir.

Q. And that figure which you received came from the Ninth Avenue office, isn't that so?

A. I don't know who it came from, I mean which office it came from.

Q. Do you know when you got that civil liability which was so high you hired other lawyers?

The Court: You mean when she got notice of the proposed settlement?

Mr. Rosenblum: Yes.

The Court: To be technical?

A. I don't know, no. I think probably the end of 1949. I really don't know.

Q. Well, it was about the end of December 1949?

A. Is that correct?

Q. Then, do you know that you went to a higher level with the lawyers Scher & Roder which resulted in your reduction of about $80,000 in taxes?

A. I knew that they got a reduction. I didn't know who was the authority in the situation.

Q. Weren't you told they had to go to conferees, the next level?

A. No. I didn't know who they dealt with at all.

Q. Well, you don't want to infer, do you, that you agreed to pay this large sum for a fix?

[fol. 131] A. No, no. There wasn't any fix involved in that particular case. We didn't supply it.

Q. You were satisfied that the amount that was assessed in the Ninth Avenue office was very high and you hired other lawyers to get it cut?

Mr. O'Hara: There has been no testimony that the amount was fixed in the Ninth Avenue office.

The Court: Withdraw the question.

Mr. Rosenblum: May this be marked for identification.

(Paper marked Defendants' Exhibit C for identification.)

Q. Mrs. Segel, I show you Defendants' Exhibit C for identification and ask you to look at it and see if that refreshes your recollection that you received——

The Court: Have you ever seen that before?

Mr. Rosenblum: The original of it. This is a photostat.

The Court: Have you ever seen the original of that document before?

The Witness: Yes. I don't think I ever read through it, but I know that it came.

Q. And did you notice it came from 341 Ninth Avenue?
A. Where is that?

Mr. O'Hara: Your Honor, I think this is not quite the right way to do it. This document is not in evidence. If that refreshes her recollection that it came from 341 Ninth Avenue?

Mr. Rosenblum: Does she recall that the document she got came from 341 Ninth Avenue?

The Witness: No, I don't recall. I just saw it there.

[fol. 132] Mr. Rosenblum: I now ask that the original be produced and I will offer the original in evidence, of Pattullo Modes, Inc.

The Court: You want to offer it in evidence at this point?

Mr. Rosenblum: Yes. This is a document she said she received from the Treasury Department.

The Court: Any objection?

Mr. O'Hara: I think she said she saw this document once before, your Honor.

The Witness: That is right.

Mr. Rosenblum: Well, I will ask another question.

Q. Did you see it at your office?
A. That I don't know.
Q. Did that have to do with the tax civil liability of Pattullo Modes, Inc?
A. Apparently.
The Court: What is it? A 30-day letter?

Mr. Rosenblum: A 30-day letter with the agent's report. It is a notice of tax assessment and they have 30 days within which to protest.

The Court: That is known in the tax field as a 30-day letter.

Mr. Rosenblum: Yes.

The Court: Any objection to its being put in evidence?

Mr. O'Hara: May I just skim through it, if your Honor please?

The Court: That is distinguishable from a 60-day letter, Mr. Rosenblum.

Mr. Rosenblum: Twice as long.

The Court: No. It is an entirely different kind of letter.

Mr. Rosenblum: I might say, if your Honor please, this is a copy received from the Government that I am offering.

The Court: I see no reason why it shouldn't go in.

[fol. 133] Mr. O'Hara: I don't see that a foundation has been laid for it at this time, your Honor.

The Court: Well, if they need it for part of their case, they can certainly have it.

Mr. O'Hara: All right.

The Court: Do you want to offer it at the present time?

Mr. Rosenblum: Yes, and I just want to ask the lady whether or not this didn't bring to her notice the amount of civil liability assessed.

The Court: This is not an assessment. It is a 30-day letter. It is a notice of proposed assessment.

Mr. Rosenblum: Well, proposed assessment.

Mr. O'Hara: I think if Mr. Rosenblum wishes to show this document to the witness and ask the witness if that refreshes her recollection as to the amount that may have been assessed, and if it does——

Mr. Rosenblum: I will withdr it for the time being, to save time.

Q. You know, do you not, that you received a notice advising you of the amount of civil liability of Pattullo Modes a figure you thought was too high?

The Court: She has already said so.

Mr. Rosenblum: I just want to save going through this.

Q. Is that so?

A. Yes.

Q. It was there after you hired lawyers and you had it cut?

A. Yes.

Q. Do you know it was cut by about a third?

A. I don't remember what it was cut by.

Q. Was it approximately that?

A. I really don't remember.

Q. It cost you $40,000 to get it cut, didn't it?

A. Well, I don't know the exact sum—$40,000. Each one paid individually.

[fol. 134] Q. You said it was about $40,000, using your expression?

A. Yes.

Redirect examination.

By Mr. O'Hara:

Q. Can you give us the date of the payments that were made to S-her & Roder, to the best of your recollection?

A. The best of my recollection is that it was early in 1950, but I can't be sure of that date.

Louis M. Berman, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Heffron:

Q. Where do you reside, Mr. Berman?

A. 1161 Lefferts Road, Hewlett, Long Island.

Q. What is your business?

A. I am in the wholesale meat variety business.

Q. Have you been promised anything by the Government with respect to your testimony, Mr. Berman?

A. Yes, I have been promised immunity from prosecution in all matters pertaining to the Gotham Beef for telling the true story of the facts relating to the Gotham Beef case.

Q. Were you employed during the year 1942?

A. I was.

Q. And by whom?

A. F. B. Cooper Company.

Q. In what capacity were you employed?

A. I was in the sales force.

Q. What does F. B. Cooper do?

A. They are a packing house broker selling packing house products.

Q. Those products were meat?

A. Meat products.

Q. Did there come a time during 1942 when you became an owner of a business?

A. I was a half owner with my brother in the Gotham Beef Company.

[fol. 135] Q. Was that a partnership?

A. It was.

Q. What did the Gotham Beef Company do? What was its business?

A. They sold to ship chandlers; that is, suppliers of ships.

Q. What did they sell to ship chandlers?

A. Beef and products pertaining in the meat line.

Q. Was that partnership succeeded by a corporation?

A. It was.

Q. When was that?

A. Sometime in 1943.

Q. What was the name of that corporation?

A. Gotham Ship Purveyors, Inc.

Q. What was the business of Gotham Ship Purveyors, Inc.?

A. It was the same kind of a business as the Gotham Beef Company. It was just incorporated instead of a partnership.

Q. Who were the owners of that corporation?

A. My brother and myself.

Q. Did there come a time when the Gotham Ship Purveyors, Inc. ceased operating?

A. Yes, that happened in the middle of 1944.

Q. Are you familiar with the manner in which sales and purchases of both the partnership and corporation were made during the years that they were operating?

A. I was.

Q. Will you describe that, please?

A. My brother, who took care of the business of operating the Gotham Beef and the Gotham Ship Purveyors, would get an order for meat to supply one of these ship chandlers. He would go out on the open market to buy this beef from a wholesaler, who he hadn't made an acquaintance with. To get this beef, he would have to pay a certain amount

over the ceiling for the meat. He would send an invoice to the seller for the meat in the full amount of the bill, which included the selling price plus the over-the-ceiling. He would get an invoice from his supplier for a bill for the ceiling price, and then he would pay the cash over the ceiling, the amount over the ceiling in cash to the supplier.

[fol. 136] Q. That is, he was buying meat at over-the-ceiling prices. Is that right?

A. That is right.

Q. Did he pay the ceiling price for the meat by check?

A. He did.

Q. How was the balance of the purchase price which was over the ceiling paid, in what form?

A. That was paid in cash.

Q. What method was used in making sales?

A. In making the sales?

Q. Making the sales to your customers, yes; what was the method adopted?

A. He sold the merchandise, invoiced the merchandise to the customer for the full amount of the bill, which included the selling price, the OPA regulated profit plus the overall ceiling price that he paid for the merchandise.

Q. In other words, the sales price was over the ceiling. Is that right?

A. That is right.

Q. What was done with the proceeds of these over-the-ceiling sales?

A. Say that again, please.

(Question read.)

The Witness: A check would be received by him for the merchandise from the person that he sold it to. The check would be cashed at the bank and a deposit was made for the cost of the merchandise, plus the regulated OPA ceiling price. The balance he took to deliver to the person that he bought the merchandise from.

Q. Did the books and records of Gotham Beef and Gotham Ship Purveyors reflect the actual amount of purchases of meat that were made?

A. They did not.

Q. Did they reflect the actual amount of sales of meat that were made?

A. They did not.

Q. Similarly, did the tax returns that were filed on behalf of the partnership and the corporation accurately reflect the total amount of purchases and the total amount of sales?

A. They did not.

[fol. 137] Q. Did there come a time when you learned that the operations of both the partnership and corporation were under investigation by the Bureau of Internal Revenue?

A. That is right.

Q. When was that?

A. I heard that from my brother in the latter part of 1945. I was away, and when I came back, he told me he had been called down by the Internal Revenue Department in reference to his records.

Q. What happened after that?

A. He told me at that time also that they wanted to see me. I went down to see them and they wanted the books and records of the corporation.

Q. Did you thereafter retain counsel?

A. I consulted with an associate of mine that was in the restaurant business, and he was an accountant. He referred me to a Mr. Goldman in his office, who in turn referred me to Mr. Ronayne of Dugan & Finnel's office.

Q. Did you retain Mr. Ronayne?

A. I did.

Q. What is the next thing that happened with respect to your tax matter?

A. The next thing that happened, the matter was investigated by the Internal Revenue Department from 1945 to 1948. At that time, I thought that Mr. Ronayne was handling the matter, and sometime in 1948, after trying to get him on the telephone for three or four days, I went to his home one evening and he told me that the matter had been given for prosecution.

Q. And that your tax matter was in the special agent's office then?

A. It was in the special agent's office.

Q. Will you fix the time, please? When did you have this conversation with Mr. Ronayne? What part of 1948?

A. Either the end of May or the early part of June.

Q. What did you do after you heard your case had been recommended for criminal prosecution?

A. I was very, very much upset, and I was beside myself. At that time, I had office space in the office of H. Merdinger & Company, who were accountants. I came to them and told them about the matter. They wanted to handle it for me, and I said I was afraid that it had gone too far for [fol. 138] them to handle it. They asked me to leave it with them for a few days. A few days later I was told that they had heard of a law firm in New York that could handle this matter for me, that had been very successful in handling matters of this type.

Q. What was the name of that law firm?

A. Schopick & Davis.

Q. Did there come a time when you met Mr. Davis?

A. I did, yes, sir.

Q. When was that?

A. I met Mr. Davis at my office. He had been called there by Mr. Tobias. That was somewhere around July, 1948.

Q. Did you have a conversation with Mr. Davis at that time?

A. We told Mr. Davis of what had transpired, that the case was in the special agent's department, that the case had been handed up for prosecution, and we asked him if he could handle the matter for us. He said that he would find out more about it and would communicate with us in a few days.

Q. And did he do that?

A. He did. He came back in two or three days later and said the facts as we had given them were correct, but he felt that he could take care of the matter. He asked for a power of attorney, and we agreed to give it to him.

(Government's Exhibits 17 and 18 marked for identification.)

Mr. Singer: Let me see them and I will consent.

Mr. Rosenblum: I might say this may be an appropriate

time for me to bring to the Court's attention that there is a concession on the part of the Government that the Ninth Avenue office had nothing to do with the handling of either Gotham Beef——

The Court: Don't interrupt this examination. At the proper time you can make any point. We are now having a document marked for identification.

[fol. 139] Q. Mr. Berman, I show you Government's Exhibits 17 and 18 for identification. Can you identify them (handing)?

A. This is a power of attorney that was signed by myself and my brother, and this one was signed by myself.

Mr. Singer: I don't know which is which. Will you tell me which is which?

The Witness: One is Gotham Ship Purveyors——

Mr. Singer: I mean 17 or 18.

The Court: When they are marked, we will get them. Were those powers of attorney?

The Witness: Yes, powers of attorney, the same date.

The Court: Are those the ones you have been testifying to?

The Witness: Yes.

The Court: All right. Do you offer them in evidence?

By Mr. Heffron:

Q. What did you do with them after you executed them?

A. I executed them and gave them to Mr. Tobias, and he in turn had them delivered to Mr. Davis.

Mr. Heffron: I offer them in evidence.

Mr. Singer: I have no objection.

Mr. Rosenblum: If your Honor please, I object to the introduction of one of these documents on behalf of my client on the ground that there has been a concession on the part of the Government that this being a Brooklyn matter it wasn't handled in the Ninth Avenue New York office in which Steinberg was the group chief.

The Court: Are you offering this against all defendants?

Mr. Heffron: Yes, your Honor, they are being offered against all defendants subject to connection.

The Court: All right. They will be taken subject to connection.

[fol. 140] Mr. Rosenblum: May we bring to the attention of the Court what occurred at the time of the motion and bring to your attention the language used by the judge?

The Court: I would be glad if you do that at the appropriate time.

Mr. Gottesman: I make the same objection for the purpose of the record.

The Court: They are received in evidence subject to connection.

(Marked Government's Exhibits 17 and 18.)

By Mr. Heffron:

Q. Now, after you executed the powers of attorney did you thereafter see Mr. Davis again?

A. The next time that we saw Mr. Davis was with Mr. Halperin. They both came to our office. Mr. Davis introduced me to Mr. Halperin as an attorney who had an office in the office of Schopick & Davis.

Q. Do you see Mr. Halperin in the courtroom?

A. I do, yes, sir.

Q. Will you point him out, please?

A. Sitting right there (indicating).

The Court: The record will indicate that the witness identified Mr. Halperin. Can you fix the approximate date of this conference or the exact date, if you can?

The Witness: This was shortly after the date of the powers of attorney, which were dated August 3. It might have been August 7th, 8th, 9th, or 10th; approximately around that time.

Q. Well now, will you relate what happened at this meeting with Mr. Halperin and Mr. Davis?

A. The four of us went out to the Curb Exchange Restaurant and we discussed the matter. Mr. Davis again told [fol. 141] us that Mr. Halperin was brought into the case because he had a very influential and wealthy associate in Washington. This associate was wealthy in his own right and he had connections with the Internal Revenue Department, and that he could handle this matter in a manner that

would be satisfactory to us. He said that if this party took this case there would be nothing more happen on it; it would be ended.

Q. Did Mr. Halperin say anything at this meeting?

A. Mr. Halperin then mentioned the fact that this influential associate of his in Washington was a man that could walk into a Senator's office, many, many Senators' offices without being announced, that he had a very influential—he was very influential in Washington.

Q. Was anything else said at this meeting?

A. Well, at this meeting we discussed the terms of handling this Gotham Beef case. I don't remember whether it was Mr. Halperin or Mr. Davis, but the amount of $100,000 was mentioned as a fee. Of course, when I heard that, I was quite taken back. I was beside myself. I didn't know whether they were fooling or whether they meant it. I did say that I would pay $25,000 to get the thing behind me because it had been with me now from 1945, and this was 1948, three years; I had been hounded in business, and it was breaking down my health and I wanted to get it behind me.

Q. Was anthing said in explanation of the fee requested of $100,000?

Mr. Singer: Your Honor, I object to that as leading.

Mr. Heffron: Your Honor,——

The Court: No, no. Overruled. You may answer the question.

A. When I questioned the extent of the greatness of the fee, Mr. Halperin mentioned that this party was not going to handle a matter of this kind because he did not want [fol. 142] to use up one of his favors unless he was paid a good-sized fee.

Q. Was anything else said at this meeting?

A. I don't think anything was said at that meeting. I think the meeting broke up and Mr. Halperin said he would talk to his Washington associate to find out what he would do in this matter.

Q. Did you see Mr. Halperin again?

A. A few days later Mr. Halperin and Mr. Davis came to our office and we went out of the office again to discuss the

matter. Mr. Davis said that Mr. Halperin had spoke[illegible] his associate in Washington and he was able to get the fee cut to $75,000. I came up to $40,000 at this conference there.

Q. Was anything else said at this conference?

A. Yes. Mr. Davis mentioned the fact that he had been trying to get in touch with Mr. Bolich, and that Mr.—and that he wasn't able to reach him for half a dozen telephone calls, he couldn't get him on the telephone; that Mr. Halperin made a call to his Washington associate and he was able to reach him within a few hours after that. That was told to us to impress the importance of the man that——

Mr. Aranow: I move to strike out that part of the answer.

The Court: No, I will allow it. Continue.

Mr. Aranow: I respectfully except.

The Witness: To impress us with the importance of the man that was going to handle this tax matter for us.

Q. Did Mr. Davis tell you who Mr. Bolich was at that time?

A. Yes. He mentioned that Mr. Bolich was the head of the Intelligence Division of New York.

Q. Did you reach an agreement on a fee at this meeting?

A. I beg your pardon?

Q. Was an agreement reached on a fee at this meeting?

A. No, there was not. No agreement was reached at this meeting.

[fol. 143] Q. Now, did there come a time when you attended a conference at Mr. Kuehl's office?

A. That conference came after this meeting that I just spoke about. Mr. Tobias and myself went to Mr. Kuehl's.

The Court: How do you spell that?

Mr. Heffron: K-u-e-h-l.

Q. Tell us who Mr. Kuehl was?

A. Mr. Kuehl was a conferee in the Intelligence Division of the Revenue Department. Mr. Mullenbach, the agent in charge, was there. We met Mr. Davis I think outside, waiting for us, and we went into the room together. Mr.

Davis argued the merits of the case with Mr. Kuehl. At that time he had been given some slips of paper by my brother showing the pattern of the way business had to be done at those times, showing where if you bought meat in those days you had to pay over the ceiling, and in some cases the supplier would give a slip of paper saying that there was 5,200 pounds of meat—I am using that as an example; that is not an exact case—5,200 pounds of meat at 18 or 20 cents a pound over the ceiling price, and it was computed to the amount that was to be brought to him in cash. We tied that in with invoices from the supplier, showing that the invoice was for the same amount of meat that the slip of paper called for. The slip of paper was in the same handwriting as the invoice of the supplier.

Q. Did Mr. Kuehl reach a decision at this meeting?

A. I beg your pardon?

Q. Did Mr. Kuehl reach a decision at this meeting?

A. If he did, I didn't know whether one was reached at that meeting or not.

Q. Well, he didn't reach any decision in your presence?

A. No, sir.

The Court: Where was this meeting? Was this at the special agents' office?

Mr. Heffron: Yes, your Honor.

[fol. 144] The Witness: 253 Broadway.

The Court: I just want to make sure.

The Witness: Conferees of the Intelligence Division.

Q. Now, after you attended this meeting did you see Mr. Halperin and Mr. Davis again?

A. We had another meeting shortly thereafter in which Mr. Halperin, Mr. Davis and myself and Mr. Tobias, and at that time my brother was there. Mr. Davis said that they were able to get the fee cut to $65,000, and the reason for the reduction of the $75,000 to $65,000, and why they were able to get this reduction was that they had another case pending which was greater in proportion and greater in amount than ours and they wanted to use our case as a guinea pig to see whether their associate in Washington could handle the matter satisfactorily.

Q. Was anything else said at that meeting?

A. I came up to $55,000. Mr. Halperin suggested that we ought to get together, that the time was running out, and he felt if we didn't come to some conclusion he might get another case and the result would be that he wouldn't have the opportunity to use up another favor, and he tried to impress me that time was of the essence, that we should do something about it.

Q. Were you told what form the $65,000 was to take?

A. At that meeting it was discussed. The $65,000 had to be in cash. For $5,000 we were to get an invoice from the Schopick & Davis office, and the $60,000 was to be given to Mr. Halperin.

The Court: In cash?

The Witness: In cash.

Q. Now, how did that meeting end?

A. We didn't come to any conclusion. We were still $10,000 apart. We parted. I walked back with Mr. Tobias. Mr. Tobias reiterated what he had told me on many, [fol. 145] many occasions, that I was foolish to go on with a deal of this type, that he thought that the case could be won on its merits. He said that the fact that you were told that you were going to be prosecuted, and you have an idea that you are going to be indicted is not so because it has to go through a series of five or six or seven different steps before an indictment is finally found.

Q. And what did you decide to do, Mr. Berman?

A. Well, we went back, and I told them, then, I didn't know what to do; I was getting to the point where I had to do something. After I left him, he went into his own office. I went into my office. I called Mr. Davis and told him that I would go ahead with the arrangements as he wanted it. I came in and told that to Mr. Tobias.

The Court: Who was Mr. Tobias.

The Witness: Mr. Tobias is an accountant in the firm of H. Merdinger & Company.

The Court: He had been your accountant?

The Witness: He was my accountant for a year or two previous to this case. Can I amplify it to this extent: I was in the meat business, and when I started in business for myself in 1948 I couldn't get space. So I had a room in their suite of offices.

The Court: I understand. Go ahead.

The Witness: Mr. Tobias then mentioned the fact, he said, "Well, up to this time you had been told that you don't have to pay out any money until you get the proper conclusion of the case, and now you hear that you have to pay $60,000 and you have to give it to Mr. Halperin." He says, "How do you know that after you give up the money that you will get the results for what you are going to pay them?"

I said, "I don't know how it will work out. I am going to leave that entirely to you. Will you please work out an arrangement whereby the money can be protected until such time that we know we have gotten the results we wanted."

[fol. 146] Q. Was such an arrangement worked out?

A. I was subsequently told by Mr. Tobias that Mr. Greenstein—they decided on Mr. Greenstein as an escrowee with Halperin.

Q. Who was Mr. Greenstein?

A. Mr. Greenstein I think is the man that Mr. Merdinger originally met on the train and recommended Schopick & Davis.

Q. Was he an accountant?

A. Yes, he was an accountant.

Q. Will you describe the arrangement that was worked out?

A. The arrangement as it was worked out was that the $60,000 was to be handed over in cash and to be placed in a safe deposit box, of which Mr. Greenstein and Mr. Halperin would have control of the money and wouldn't be released to Mr. Halperin until such time as Mr. Tobias had gotten word from the proper authorities that the case had been—that the prosecution end of the case had been over with, and then he would release the money.

Mr. Heffron: This is a convenient stopping place, your Honor.

The Court: All right. We will adjourn until 10:30 tomorrow morning. Do not discuss the case among yourselves or with anybody else.

(Adjourned to February 17, 1955, at 10:30 a.m.)

New York, February 17, 1955,
10:30 o'clock a. m.

Trial resumed.

Mr. Heffron: Your Honor, there is one preliminary matter. I understand counsel have agreed that on page 901 of the record——

The Court: Yesterday's record?

Mr. Heffron: The day before yesterday. All references to Mr. Scherm on that page should read Mrs. Scherm.

[fol. 147] The Court: Mrs. Scherm. That is when the witness was being asked about dresses. Mrs. Scherm had offered to pay for them.

Mr. Heffron: Yes.

The Court: I think the jury understood that.

LOUIS M. BERMAN resumed the stand.

The Court: You may resume.

Mr. Heffron: That was all except the last reference to Mr. Scherm.

The Court: All right.

Direct examination continued.

By Mr. Heffron:

Q. Mr. Berman, you told us yesterday an arrangement was made whereby Halperin and Greenstein would hold the $60,000?

A. That is right.

Q. Now, did you obtain the $60,000 in cash?

A. I brought $47,500 at one time and $12,500 at another.

Q. Well, how did you obtain the money?

A. After I had made the arrangement of paying the $60,000, I figured that I had to get some money. So I went to Providence where my folks lived. My mother had some money, and I made an arrangement there to get as much money as I could. Later on I met—the day that I brought the money to Mr. Davis' office I met my sister at LaGuardia Airport. She brought me $20,000 in cash which came from

or Gotham Ship Purveyors on the ground that it is not binding upon us and not competent or relevant.

The Court: All this evidence is taken subject to connection.

Mr. Rosenblum: And we have an exception as to all this proof.

[fol. 150] The Court: Yes.

Mr. Gottesman: And the same holds true for us?

The Court: The same thing holds true for all defendants.

The jury will understand that this testimony merely indicates that money was given to Mr. Davis and is taken subject to connection as to whether any testimony shows that anything with reference to this matter was participated in by the defendants.

Mr. MacMahon: Your Honor, may I note that the testimony was that it was given to Mr. Halperin.

The Court: I withdraw that. It was given to Mr. Halperin, one of the defendants, that is right.

(Marked Government's Exhibit 19 for identification.)

Q. I show you Government's Exhibit 19 for identification, Mr. Berman. Can you identify it (handing)?

A. This is an invoice dated October 29 on the billhead of Schopick & Davis to Louis M. Berman and Philip M. Berman and Gotham Ship Purveyors in the amount of $5,000 for professional services.

Q. Does the date of that bill refresh your recollection as to when you heard that your criminal prosecution had been dropped?

A. I would say that we had heard just previous to receiving this bill. We didn't receive the bill until after we heard that the prosecution had been dropped.

Mr. Heffron: I offer it in evidence.

* * * * * * *

Q. Now, after you learned that criminal prosecution had been stopped on your tax matter did you continue your relationship with Schopick & Davis?

A. With Mr. Davis. He is the only man I ever had contacted at that office. Mr. Davis was supposed to represent us in the civil end of the case.

Q. Well, what happened after the criminal matter was stopped?

A. As far as I know I think Mr. Davis had a couple of [fol. 151] conferences with the Revenue Department in Brooklyn.

Q. Now, did you see Mr. Davis in early 1952?

A. The next time that I saw Mr. Davis was in the latter part of 1951 or early part of 1952. I don't remember just when it was.

Q. What happened on that occasion?

A. I arrived at my office sometime in the afternoon and as I got there Mr. Davis and Mr. Halperin, who had been in the office previous to my getting there, were just leaving. Mr. Davis walked inside my office with me to tell me that he was being subpoenaed to the King Committee, I think, at that time, and that if anybody questions me on the Gotham Beef case I should refer them to him as my attorney in the matter.

Q. Did you say Mr. Halperin was present?

A. Mr. Halperin and Mr. Davis were in the office at that time but Mr. Davis came into my office alone with me to tell me that.

Q. Now, did you see Mr. Davis after that?

A. Yes, I saw Mr. Davis again after that. I would say it was a month or six weeks later in the office, and at that time he told me that his books had been subpoenaed by the King Committee, and that it was very possible that the Gotham Beef matter may come up and for me not to forget what he told me last time, that if anybody should question me I should do no talking about it, to refer them to him.

Q. And did you thereafter see Halperin?

A. Yes. I saw Mr. Halperin sometime in March, and I am basing that time on my subpoena that I received to appear before the grand jury. Mr. Halperin called me to say that he wanted to see me. He came to the office. Mr. Tobias and myself and Mr. Halperin went out. We went to the Fleetwood Restaurant where we had lunch, and Mr. Halperin said he expected to be indicted in the matter of the Gotham Beef case, and that he felt that he was going to stand on his constitutional rights and not do any talking.

my mother. I had $9,000 in cash. I got $8,000 from my wife, who had that in cash. I cashed a personal check of mine of $7,500. I sold three bonds, three government bonds, of $1,000 each, which gave me $2,970. I put $30 with it and I had $47,500 to bring on the first visit to Mr. Davis' office.

Q. Did you bring it there?

A. I did, yes, sir.

Q. Tell us what happened.

A. I had the money I had accumulated that I just gave reference to, and then I took the $20,000 which my sister told me was in the package. I went with it to my office. [fol. 148] I left my car in the downtown parking garage, took the money upstairs. In the office Mr. Tobias had a briefcase. We put the money in the briefcase and from there we went by cab to Mr. Davis' office.

Q. What happened when you got there?

A. Pardon?

Q. What happened when you got there?

A. We came to the office and Mr. Greenstein was sitting outside. Mr. Tobias introduced me to Mr. Greenstein, who I had met for the first time at the office there. We went inside to Mr. Davis' office and Mr. Davis was there, Mr. Halperin was there, Mr. Schopick was there. They introduced me to Mr. Schopick. He left immediately. There remained in the office Mr. Davis, Mr. Halperin, myself and Mr. Tobias. Mr. Davis and myself counted out the money out of the different packages that I had brought. It was counted out and put into one paper package, wrapped and tied. After that was done Mr. Davis called Mr. Greenstein into the office and Mr. Tobias told him he was turning over this package to him and to Mr. Halperin to be kept in escrow until such time as he would notify him it was permissible to release the money.

At that time I had told Mr. Davis that that is all the money I had, but I would arrange to get the other $12,500 in a few days and bring it to him, and he felt in view of the fact that I had brought the biggest part of the money he would go along with that arrangement.

Q. What was done with the money after it was counted and put in this package you described?

A. It was wrapped in a paper, in a brown paper package. Mr. Tobias turned over the package to Mr. Greenstein and told him just as I have told you just now, and then they left; Mr. Greenstein and Mr. Halperin left the office. It was to be kept in a vault until such time as it was released by Tobias.

Q. Did you thereafter pay the balance of the $60,000?

A. Yes, I paid the other $12,500. I made another trip to Providence. One of my brothers discounted a note at the bank for $5000. My brother-in-law loaned $7,500 to [fol. 149] another brother of mine on a note. They were turned into cash and given to me and I brought it to New York. I came to New York with it, and my brother Phil and myself went to Mr. Davis's office, where we gave him this package of $12,500. I told him what was in there. It wasn't counted and we left immediately.

Mr. Aranow: May I have a date fixed?

Mr. Heffron: I am fixing it right now.

Q. How long after you delivered the $47,500 did you deliver the $12,500?

A. I would say that it was within ten days.

Q. Do you recall when you delivered the first?

A. We have established the date. I know the date is September 15th because that is the date that the box was opened. So I know that the date was September 15th. I couldn't remember exactly other than from that memorandum.

Q. After you had paid all this money over, did you hear anything about your tax case?

A. Mr. Tobias told me about a week later that he had heard that the prosecution in the Gotham Beef matter was dropped and that he had released the money to Mr. Greenstein to give to Mr. Halperin.

Q. About when was that?

A. That should have been within two weeks from the time that we originally borrowed the first money. I would say about two weeks. I don't know the exact date.

Mr. Rosenblum: I don't recall, your Honor, whether or not there was noted an objection yesterday on behalf of my client to all this testimony on either Gotham Beef

He wanted me to take the same stand, that I should not talk and stand on my constitutional rights. He mentioned [fol. 152] the fact that he had done me a good turn and that was the least I could do for him.

He also brought to my attention at that time that the years of the Gotham Beef case were outlawed in so far as the prosecution was concerned, and that I had nothing to fear by not talking. He did say to me, as we walked away, that it would be best for me to engage an attorney.

Q. Did you engage an attorney after that?

A. I beg your pardon?

Q. Did you engage an attorney after that conversation?

A. I engaged an attorney after I received the subpoena to appear before the grand jury in Brooklyn.

Q. And did you testify before the grand jury?

A. Not the first time that I went there, I did not testify.

Q. Well, did you eventually testify?

A. I eventually testified on the advice of my counsel. I testified before the grand jury in Brooklyn.

* * * * * *

Cross Examination.

By Mr. Corbin:

Q. Well, you say now that you had done nothing wrong that troubled your conscience at all as far as Uncle Sam was concerned up to the time you went into business in 1946 with this other gentleman, is that right?

A. I say—you asked me if I cheated Uncle Sam and I said no, I never cheated Uncle Sam.

Q. Well, what do you call it?

A. I am satisfied that any moneys that we received from the sale of meats which was over the ceiling was paid out, and on that basis I felt that I did not cheat Uncle Sam.

Q. What is this talk about immunity then? You had nothing to get immunity from. Is that right?

A. Oh, yes.

Q. You had done no wrong?

A. Well, but I was told by the attorney that I had hired to process my tax case for me, that the Government had handed the case for prosecution. Today if I had it to do

[fol. 153] over again, I wouldn't do it that same way. I would have listened to people. But at that time I was too scared, I was petrified, I was worried——

Q. What were you scared about if you knew you had done no wrong?

A. For the simple reason I was afraid that when he said my case was handed for prosecution, the only thing I could think of is I was going to be indicted.

Q. It was the lawyer then that scared you by telling you that you were in the shadow of a possible jail sentence. Is that it?

A. The lawyer told me that my case had been passed to the department for prosecution. He made it at his house, as I testified.

Q. Whatever he told you and wherever he told it to you, you knew in your own heart and mind and conscience that you had done nothing wrong?

A. I felt that way, yes, sir.

Q. You couldn't understand, I suppose, why there should be any reference of the matter to the Fraud Bureau?

A. Yes. I couldn't substantiate all these payments we made over the ceiling. I knew that. I knew we couldn't substantiate them. I knew we couldn't prove we made all these payments. I also knew in 1948, when I heard, that I was just starting in business and that I couldn't give out information of that sort if I wanted to go in business for myself, to tell all the people that we had paid money over the ceiling. I knew those things. I couldn't justify and I couldn't substantiate these payments.

Q. What it boils down to then is that, whereas in your own mind you knew you had done nothing wrong at all, the difficulty that you saw was that you couldn't offer competent proof of payments that you had made. Is that it?

A. That is right.

Q. So that it was merely and only a matter of failure on your part of an ability to prove, other than your own statement for it and the statement of your brother perhaps, the making of certain payments?

A. That is correct.

[fol. 154] Q. You wouldn't knowingly cheat the Government would you?

A. I haven't, no, sir, and I didn't.

Q. I say you wouldn't in any way at any time?

A. No, I wouldn't.

Q. You have always been an honest man?

A. Yes, sir.

Q. And never done anything wrong as a matter of fact. Is that right?

A. I don't know of anything that I have done wrong.

Q. Is that right?

A. I feel that way, yes, sir.

Q. And you know that is so?

A. Yes, I do.

Q. So that with a clear conscience you employed a lawyer when you heard that the case had been sent down to the Fraud Bureau?

A. I had a lawyer before that, too.

Q. Did you? Was that Mr. Ronayne that you mentioned yesterday?

A. That is right.

Q. Prior to Mr. Ronayne, had you had another lawyer?

A. I did not.

Q. Did you or the business of the Gotham Beef Company or the other corporation have any lawyer that you usually went to, any regular attorney?

A. No, we didn't have any occasion to use any lawyers in the Gotham Beef or the Gotham Ship.

Q. When was it that you first heard that the Government was investigating you or your company?

A. It is my belief it was sometime the latter part of 1945.

Q. Was it then that you first employed a lawyer?

A. That is right.

Q. Was he Mr. James Ronayne?

A. That is right.

Q. Had you known him before?

A. Never met the man before.

Q. He had been recommended to you by——

A. A Mr. Goldman.

Q. Whose business was what?

A. He was an accountant in an office of an associate of mine in this restaurant in Jamaica.

Q. When you employed Mr. Ronayne, did you have an understanding with him about fees?

A. When we employed him, he asked for a retainer of $5,000.

[fol. 155] Q. And you gave it to him?

A. We did, yes, sir.

Q. How long did he continue to represent you?

A. He represented us from the time that I first came there, whether it was the latter part of 1945 or the early part of 1946, to 1948.

Q. Did you ever pay him any other sum or sums for services?

A. Never gave him another cent.

Q. After 1945, when you employed him, and down to the time in 1948 when he told you that the matter had been turned over to the Fraud Section, had you heard from him at all?

A. I was in communication with Mr. Ronayne, I would say, over that full period, not over a dozen times.

Q. Do you know of anything he did for his money?

A. Well, you ask me, and I feel that he didn't do anything for his money.

Q. Someone recommended another firm of lawyers in 1948. Is that right?

A. That is right.

Q. That other firm didn't seek employment from you. On the contrary, you, through some friend who had mentioned their name, and with your Mr. Tobias, the accountant, as the go-between, so to speak, went to that firm and employed them?

A. That is right.

Q. That firm was Schopick & Davis?

A. That is right.

Q. Did you have an understanding with them also about fees?

A. Well, our understanding was, as I mentioned yesterday, that if they didn't bring the case to the proper conclusion, they would get no fees. We didn't have to pay them any retainers. We didn't have to pay them anything until such time as they brought the case to an end.

Q. When you say brought the case to an end, you mean

and then understood that that referred to an end of the criminal prosecution, right?

A. That is right.

Q. That end came, as I understand you now, in the closing weeks or months of 1948?

A. Somewhere between the end of September and the end of October.

[fol. 156] Mr. Corbin: I understood that he told me what the deal was, and that it was to handle the criminal prosecution, and if it were avoided, the money was to be paid. Otherwise, it was not to be paid. That is the deal as I understood him in several answers he made to me.

The Court: So did I. Now, ask any further question.

The Witness: That was for that phase of the matter.

Mr. Corbin: After this objection, he adds this other talk.

Mr. Heffron: I object to that comment.

The Court: Sit down. I will not have arguments between counsel. Ask your next question, Mr. Corbin, and get facts instead of arguments.

Q. Now, after what has transpired, will you tell me what the talk with Davis & Schopick was regarding the basis of their employment and the terms thereof upon which they were to act as your attorneys?

A. No terms were ever mentioned on the basis of the civil matter. They were to explore the facts in the civil case. They were to represent me before the different departments that were to handle it, and the matter of fee would be straightened out after and when and if that matter was finally brought to a close.

Q. What matter?

A. The matter of the civil—the moneys that the Government claimed that I owed them.

Q. So that the fee that they were to get was not to be paid until the civil matter was out of the way. Is that right?

A. That isn't what I said at all. The fee that they received for the handling of the prosecution was a separate deal. The fee for the civil matter was not discussed.

There was no mention of what the amount of the fee would be.

Q. What was the amount of the fee or the discussion as to what it would be with reference to their work on the criminal side of the matter?

A. That fee was $65,000, the fee that I mentioned yesterday.

. . . . . .

[fol. 157] By Mr. Singer:

Q. As I understand your point here—and if I am incorrect, you tell me—what your brother and you did in this business was that if you paid under the table for meat, you charged the man that bought it the same under-the-table price; and the only thing that you got for yourself was this penny and a half or two cents OPA-permitted profit?

A. That is right.

Q. And you never grabbed a penny for yourself on the black market switch?

A. I did not, no, sir.

Q. So far as you know, your brother didn't?

A. So far as I know, he didn't.

Q. And he never told you that he did?

A. No, he never did.

Q. And you never cut up any of that money, any extra money, on it?

A. That is right.

Q. You did do black-market business when you went out to buy the black-market meat and you paid by check and by cash for the overage?

A. That is right.

Q. That is what they used to call it, overage. Isn't that right?

A. That is right.

Q. That required substantial amounts of cash?

A. No.

Q. You mean little cash?

A. It wasn't handled that way. After he collected from his seller, he then turned over the cash to the fellow that he bought it from.

. . . . . .

Q. Now, your own personal tax matters: They were correct; you had paid the right tax?

A. Yes, but I couldn't justify the moneys that the special agent wouldn't allow for moneys I received to pay for turkeys and other products.

Q. Now, after you had that arrangement your lawyers reported it to you and you agreed to do that, didn't you?

A. Yes.

Q. Tell the truth in return for this immunity?

A. That is right.

[fol. 158] Q. Now, in addition to you, your brother Philip got immunity, didn't he?

A. He did.

Q. And in addition to Philip your accountant Tobias got immunity?

A. I don't know whether Tobias got immunity. I can't answer that question.

Q. In addition to Mr. Tobias, Mr. Greenstein got immunity?

A. I can't answer for him either.

* * * * * * *

Q. Now, you wouldn't pay any money for a fix, would you, in 1946 and 1947?

A. I don't think so.

Q. And you never paid one single penny to anybody for a fix?

A. No.

Mr. MacMahon: Your Honor, I object to that question on the ground that it calls for a conclusion. That is one of the issues for the jury in this case. He can ask the facts if he wants to.

The Court: Well, I will sustain the objection. You can get the facts and you may get the conversation. Get the facts in the case and the jury will have to decide.

Mr. Corbin: Will your Honor allow me, for my client, an exception to your Honor's ruling?

The Court: Yes. Your all have an exception. I think you can bring out the facts.

Mr. Corbin: That is what he is asking for.

Mr. Singer: I am entitled to get the operation of this witness' mind.

The Court: Yes, you certainly are.

Q. Did you pay a single dollar to anybody for a tax fix?

Mr. MacMahon: Your Honor, the same objection.

The Court: I will allow it.

Q. Go ahead.

A. At the time I paid the money I had no thought that there was a fix at all.

Q. And nobody told you that they were going to fix your case?

A. No. They told me that they had a Washington associate that they had to pay this money to.

[fol. 159] Q. But nobody—I want to get a direct answer if I can get it—nobody said to you that this money that you are going to pay is for a fix?

A. That is right.

Q. Had it been so you wouldn't have paid it, isn't that right?

A. I don't think I would have.

Q. Because you wouldn't do anything criminal; isn't that right?

A. I will stand on that statement, yes.

Q. As I understand you, you paid the $5,000 fee to Mr. Ro-*ayne* for straight legal and accounting services, whatever it was?

A. I paid him a fee for straightening out my tax matter.

Q. Well, to represent you?

A. Yes.

Q. To do the work properly and legally, is that right?

A. Surely.

Q. Now, then, you met Davis and Halperin and you agreed to pay them $65,000 to handle your tax matters, to see that no criminal prosecution should result, is that right?

A. That is right.

Q. And as far as you know they were to do it legitimately and honestly?

A. That is right.

Q. You weren't paying this money for Davis or Hal-

perin to improperly or corruptly get some tax man to do something wrong?

A. No. I thought that that money was for fees.

Q. And you honestly believed beyond any question of doubt that you were innocent and should not be prosecuted criminally?

A. I did believe that.

Q. And you still believe so today?

A. I do, yes, sir.

Q. Well, do you realize that the Government has named you as a conspirator in this indictment? Do you know that?

A. I know that they have, yes.

Q. Do you know that the Government says that you joined a conspiracy to fix your tax case, and you never did that, did you?

Mr. MacMahon: Your Honor, I object to that.

A. That doesn't make it right, because they say so.

[fol. 160] The Court: It calls for a conclusion.

Q. No, you say it isn't——

Mr. MacMahon: Your Honor, may we have a ruling on this?

The Court: Let Mr. Singer ask another question. What is your question?

Q. You just stated——

The Court: No, no, ask the question.

Q. Did you just say that just because they say so it doesn't make it so? Didn't you say that?

A. That is right.

* * * * * * *

Q. Let us see. You are right. Now, you testified, am I correct, that before you met Mr. Davis or Mr. Halperin, you had been hounded in business "and it was breaking down my health, and I wanted to get it behind me." That all happened before you met Davis or Halperin?

A. That is right.

Q. Who had been hounding you?

A. The special agents had been every place that I could think of. I couldn't go any place in the usual procedure

of my duties that I wouldn't hear that the special agent was here yesterday examining sales made to your company. He was in the place where I was employed, F. B. Cooper Company. He was in there maybe four or five times embarrassing me, making my job so that it wasn't a proper place to be. Every place I could go to, that is all I heard about, that the special agent had been there before, or I would get telephone calls from some friend of mine that I was doing business with, "I had so and so here today, the special agent, investigating you," and this went on from 1945 to 1948.

Q. Incidentally, since you are speaking of special agent, it is none of the people in the courtroom, is it?

A. Beg your pardon?

[fol. 161] Q. What is the name of this special agent?

A. Mullenbach.

Q. Mullenbach?

A. Yes.

Q. Now, you went to see Mr. Mullenbach or somebody else, Mr. Kuel with Mr. Davis?

A. When we went to see Mr. Kuel, Mr. Mullenbach was there at the conference.

Q. Before you went to see Mr. Mullenbach or Kuel you had already met Mr. Halperin?

A. That is right.

Q. One time?

A. That is right. I think one time.

Q. No money had been passed?

A. None whatsoever.

Q. Now, had you discussed in Halperin's presence the facts of your case?

A. The facts were—there must have been something said about the case. We discussed the case. He knew that the case had been recommended for prosecution.

Q. And didn't you tell Mr. Halperin, like you told us here today, that you were entirely innocent and that you had been hounded and that you didn't do anything and that it was wrong to criminally prosecute you?

A. I said that then and I say it today, too.

Q. And that is what you told Mr. Halperin?

A. Yes.

Q. Now, you knew Mr. Halperin was a lawyer?

A. Yes. I was told he was a lawyer by Mr. Davis, that is right.

Q. Now, then, do you remember that you sat down with Mr. Tobias and you prepared, and Mr. Halperin and maybe Mr. Davis and you prepared additional new evidence to show Mr. Kuel?

The Court: Do you object?

Mr. MacMahon: I object to the question, your Honor, on the ground that again it assumes facts not in evidence.

The Court: I think the form of your question is wrong, Mr. Singer. I will sustain the objection to the form of the question. You may ask facts. Ask questions to bring out the facts.

[fol. 162] Q. Do you say that you never showed to Mr. Halperin and Mr. Tobias and Mr. Davis the supporting evidence, some supporting evidence that you had of these payments that you claim you made?

A. I don't remember whether I showed them that previous to the conference, but I do know we brought these substantiating figures, those substantiating papers that we had—we brought them to that conference.

Q. So that you claimed at that time that you had some substantiating evidence which would show that the deductions, or whatever it was—these payments—were made, and that no tax therefore was due on them?

A. My brother dug those papers up and we brought them to Kuel's office.

Q. Those were the papers your brother dug up after Ronayne was out of the case and when Tobias and Davis and Halperin were in it?

A. That is right.

Q. These were papers that your brother dug up that he hadn't yet shown to Ronayne?

A. I don't remember whether he ever showed them to Ronayne or not. I don't believe we had, in the two and a half years Ronayne had the case, over two or three conferences with the man.

Q. So that the fact of the matter is, if I can put it in one sentence, you brought to Halperin's attention new evidence that Ronayne had not been shown. Isn't that right?

A. That would be correct, yes.

Q. And that was the new evidence that was brought over to Mr. Kuel?

A. That is correct.

Q. And, so far as you know today, it was that new evidence shown to Mr. Kuel and Mr. Mullenbach which brought about the result of no prosecution, so far as you know?

Mr. MacMahon: I object.

The Court: Do you know whether that brought about the result?

The Witness: I do not. I couldn't answer that question Yes or No. I haven't the least idea that that is what brought about the no prosecution.

[fol. 163] Q. Do you know that this new evidence was left with Mr. Mullenbach and Mr. Kuel for examination, do you not?

A. I think it was. I would say Yes to that. I just don't have a clear recollection about it, but I would say Yes.

. . . . . .

Q. All the time that you saw Mr. Halperin, up to the end of the time of no prosecution, did Halperin ever tell you to tell a lie to a federal agent?

A. He did not.

Q. Did he ever tell you to produce a phony bill or a phony document.

A. He did not.

Q. Did he ever tell you to change a book or change an entry in a book?

A. He did not.

Q. Did he ever tell you to get a false affidavit from anybody?

A. He did not.

Q. Did he ever tell you to do anything wrong whatever?

A. He did not.

Q. And that would be your answer on any subject at all up to the time you were told no criminal prosecution. Is that right?

A. That is right.

Q. You had no further dealings with Mr. Halperin when it came to your civil tax matter, did you?

A. No, that was supposed to be handled by Mr. Davis.

Q. That was by Mr. Davis and Davis alone?

A. That is right.

Q. After you made this deal for immunity in Brooklyn, you went before the grand jury and you say you answered every question and everything you answered was true?

A. I answered it to the best of my knowledge.

Q. Several months later you were subpoenaed to Washington before the Kean Committee?

A. That is correct.

Q. Now, although you had a promise of immunity, I think you testified that you refused to answer on the ground of self-incrimination?

A. That is correct.

Q. Be good enough to explain to me, if you can, who told you this.

A. Mr. Leo Kotler, to answer that way. I was guided entirely by what he told me to do.

[fol. 164] Q. In other words, Mr. Kotler told you that although the Government had given you immunity and you testified before the grand jury fully in Brooklyn, now you should refuse to answer to the Kean Committee?

A. That is what he told me. I was guided by what he told me.

Q. But it was not any of these people on trial who told you not to answer before the Kean Committee, was it?

A. What do you mean?

Q. Did Mr. Halperin tell you not to answer before the Kean Committee?

A. He did not.

Q. Did Mr. Davis tell you not to answer before the Kean Committee?

A. He did not.

Q. Did Mr. Schopick?

A. No, sir.

Q. Mr. Hoffman?

A. No, sir.

Q. Mr. Bolich?

A. No, sir.

Q. Mr. Scherm, or any other person named in this case?

A. No, sir.

Q. Will you tell me the reason why you were told to conceal from the Kean Committee and stop the work of the Kean Committee after you had an agreement for immunity from the Government?

A. Why don't you ask Mr. Kotler that?

The Court: Objection sustained.

Q. Were you ever told any reason for that action?

A. No, sir.

Q. Did you ever ask for the reason?

A. No, sir, I was guided by what he told me. I employed him—I engaged him—and he was handling my case for me.

Q. Did Mr. Kotler say that it was part of the deal with the United States Attorney's office that you were to help the Department of Justice but not the Congress?

A. He never said that to me at all.

Q. But when it came to testifying before Congress, you wouldn't?

A. That is what I was told to do.

[fol. 165] Monroe Tobias, called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Heffron:

Q. What is your occupation, Mr. Tobias?

A. I am an accountant. Would you mind speaking a little louder, please, Mr. Heffron?

Q. Are you associated with a firm?

A. Yes, H. Merdinger & Company.

Q. Where are they located?

A. At 61 Broadway.

Q. Have you been promised anything by the Government with respect to your testimony?

A. I have.

Q. What is that?

A. I have been promised that in the event I testified fully and completely in connection with this matter, that there would be no action taken against me.

* * * * * * *

Q. On the Berman tax case.

A. A few days after that, there was again a meeting between Mr. Davis, Mr. Halperin, Mr. Berman, myself.

I would like to stop at this point to say that there was a Mr. Hoffman at certain of these meetings, but I can't place him at any specific one. At the meeting that I refer, I can recall that there were Mr. Davis, Mr. Halperin, Mr. Berman and myself; that Halperin said that he had again been in touch with the Washington man, and they had finally convinced him, and this was the lowest they could possibly go, they were going to agree to $65,000 as a fee; that the only reason that the fee had been reduced to that extent was that they had convinced this man that a larger case that they were handling—that the Berman case could be used as a guinea pig in connection with convincing other people in a larger case that they were handling. Berman agreed to come up to $55,000 and again there was no meeting of the minds on that score.

Halperin said that he thought that Berman was making a mistake; that he was awfully sorry, because he liked [fol. 166] Berman; that he knew that this man had come down considerably, and that it was a shame he was letting $10,000 stand in the way.

Still Berman would not agree. Later in the day Berman told me that he had called Davis and had said, "All right, I'll go along with the $65,000 fee."

Q. Was there any further meeting?

A. Yes, there was a subsequent meeting which took place a short time after that at which were present Mr. Davis, Mr. Halperin, Mr. Berman and myself, in which we were told for the first time that the Washington associate insisted that his fee be put up in cash in advance in escrow, so that he be protected that Berman would not throw him out as he had thrown out Ronayne previously.

I advised Berman that——

Q. Were you told how much of the $65,000 was to be put up in cash?

A. That is right. The agreed-on fee, as it was told us, was that the Washington associate was to get $60,000 in cash to be put up in advance; that Davis and Halperin were content to wait for their own, and that would be $5,000, which they would wait for and take by check.

Q. Did either Davis or Halperin suggest who should hold the $60,000 in cash for the Washington associate?

A. If you want me to continue the entire meeting, as I recall it, I can do that. The $60,000 was to be put up in cash in advance, and it was to be put up to be held by Mr. Halperin, who was the only one that was going to be trusted in this deal by the Washington associate.

Mr. Berman refused. I refused, I advised Berman that——

Q. Before you get to that point, let me ask you this, Mr. Tobias. With respect to the $5,000, was that a contingent fee?

A. The $5,000 was as contingent as the $60,000 was, namely, that nothing was to be paid unless the criminal prosecution were to be eliminated in the New York office.

[fol. 167] Q. Berman did not agree to having Halperin solely hold the money. What arrangement was worked out?

A. An arrangement was worked out where Mr. Halperin was to act as one of the escrowees representing their side, and that Mr. Leo Greenstein was to act as one of the escrowees representing Berman. Naturally, since Greenstein had not been consulted on this before, it was a question of getting him to agree.

Mr. Davis said that if it was acceptable to Berman, he would speak with Greenstein and find out if he was willing to serve.

The Witness: Now, the exact terms of the escrow as we had discussed it was that there would be a joint escrow, Mr. Halperin and Mr. Greenstein, that until I were to have heard with my own ears from the special agents' office from a responsible official there that was to be no criminal

prosecution in the Gotham matter, only until I was advised and had heard it, the money was not to be released.

In the event that I had heard it I was to advise that to Mr. Greenstein and then that the money would be released to Mr. Halperin.

Q. Released to whom?

A. To the other escrowee, Mr. Halperin.

Q. What happened after that arrangement was worked out?

A. After that arrangement was worked out, it was some time I would say about a month after the meeting with Mr. Kuehl, at which Mr. Berman and I had met at our office, and just parenthetically, Berman had office space in our office, so it was a fairly simple thing for us to do—Mr. Berman on that particular day was in the office and had some bundles with him which were opened and I saw that there was a substantial amount of cash. Mr. Berman told me that there was $47,500 in cash that he had with him, that he had not been able to get the entire $60,000 up to that time, but nevertheless he was going to go over to Davis's [fol. 168] office with that. Berman and I looked over the money without counting it, but merely counting the bundles, Berman showing me that this was five, this was ten, and a series of other thousands. So I saw that there was forty-seven five, subject to each individual bundles being counted. The money was wrapped up, put into a briefcase. Mr. Berman and I then took a cab to go over to the office of Schopick & Davis, at which—when we went up there we met Mr. Halperin and Mr. Davis; Leo Greenstein, to whom I referred to, and who was the second escrowee, was sitting in an outer room. I believe that was the first time I met him. I spoke with him and chatted with him a couple of minutes, introduced Louis Berman to him. Then Berman and I went into the inner office with Mr. Davis and with Mr. Halperin. The money was counted out there by Davis and Halperin, Louis Berman watching the counting and I just looking over the proceedings from the room. After the money——

Q. How much money was counted?

A. Forty-seven five, and then Mr. Berman said, "I don't have the full sixty. I got $47,500 here. I will get the other

twelve five in a week or so;" and Mr. Halperin said, "That is all right, we will trust you for the balance."

After the money was counted, there was forty-seven five there, it was rewrapped. At that point Mr. Greenstein was called into the room and I explained, since I had not myself spoken with Greenstein, I wanted to make sure he understood the nature of the escrow holding here, that it was to be a joint escrow, and the terms under which it was to be released; that was explained then, and the money rewrapped was put into a briefcase and Mr. Greenstein and Mr. Halperin left to open a vault so far as I know.

Q. After the $47,500 was paid did you learn that the balance of the $60,000 in cash had also been paid?

A. A couple of weeks later Mr. Berman told me he had been over to Davis's office with the other twelve five and had left it there.

[fol. 169] Q. Well now, after the $60,000 had been paid did you get the result you bargained for?

A. Yes. Sometime in the latter of October I got a call from Mr. Davis saying that he had heard from Mr. Kuehl that there was to be no criminal prosecution in this matter. I told Davis that I would like him to make an appointment so that I could meet with him and Mr. Kuehl so I could hear this myself. The appointment was made for either the following day or the day after. I met with Mr. Kuehl. Mr. Kuehl said that this had been a borderline case, but he was convinced that under all the facts as he saw them, that the evidence which we had submitted, that there should be no prosecution in the Gotham case.

Q. Now, with reference to this conference you had with Mr. Kuehl can you fix the time that the $47,500 was delivered to Halperin?

A. Well, there were two conferences with Mr. Kuehl. I would say that the forty-seven five was delivered about a month after my first conference.

Q. Well, can you fix the time of your first conference with Mr. Kuehl?

A. That I would say was about the middle of August. So that the turning over of the forty-seven five would have been about the middle of September.

Q. 1948?

A. Of 1948.

Q. Now, after an agreement had been reached as to the fee, that is the $60,000 and the $5,000 which you testified was contingent, to your knowledge, was any attempt made to change the contingent fee statements which had been filed?

A. Not to my knowledge.

Mr. Singer: I object to that. They had not been filed. The record shows it wasn't filed until November 9.

The Court: There is no indication that they had been filed.

Q. When the contingent fee statements were executed what was done with them?

A. They were turned over to Mr. Davis.

[fol. 170] Q. Now, in the course of these meetings with Mr. Halperin was there ever any occasion on which you discussed the merits of Mr. Berman's tax case with him?

A. I had discussed them with Mr. Davis, and they were not discussed at the subsequent meetings with Mr. Halperin.

Q. Did he ever ask you what kind of substantiation you had?

A. He did not.

Q. You never told him anything about the merits of this case?

A. I don't believe that I did.

Q. In all these conferences with Mr. Halperin were you ever told the name of the man in Washington?

Mr. Aranow: I object to that. It has already been stated and repeated several times.

The Court: The objection is overruled. Finish your question.

(Last question read.)

The Witness: I never was.

Q. Were you ever told that this man in Washington was a lawyer?

A. I never was.

Q. Were you ever told that this man in Washington was an accountant?

A. I never was told that.

Q. Were you ever in any——

Mr. Singer: I object to this line of questioning; your Honor has said the same thing to me, that I may not put a question that way. On direct you can't do it, but on cross you may. Ask for any conversation, but not direct attention to what wasn't done.

The Court: Is this an objection or is this a lecture on evidence, Mr. Singer? I will sustain the objection if that is what it is.

Mr. MacMahon: May the Government be heard on that, your Honor? I submit the absence of conversation is just as much evidence as the existence of them.

[fol. 171] The Court: I think it was brought out.

Mr. Singer: If you want to do it, all right.

The Court: Wait a minute. I sustain the objection, Mr. Singer. Don't talk or I may reverse myself.

Mr. Singer: You are right. When you win you should walk home.

The Court: Go ahead.

Q. After criminal prosecution had been stopped, when you heard it from Mr. Kuehl, what did you do?

A. When Mr. Davis and I left that meeting, I congratulated him very heartily. He said, "I told you we could do it." He said, "Now I hope I will get a chance at the civil case."

I said, "Berman said you would if you were successful in this."

I went back to my office. I called—first I spoke to Mr. Berman who was the man most interested in this thing and told him that the criminal prosecution had been eliminated. I called Mr. Greenstein and told him that I had heard that the criminal prosecution was eliminated and therefore he could release the escrow money to Mr. Halperin. Greenstein said he would. A day or so later he called me back and said he had.

Q. Now, this conversation in which Davis referred to the civil liability of Mr. Berman: Can you fix any approximate time for that?

A. The date of the conversation?

Q. Yes. You said that Mr. Davis——

A. Well, that would have been the latter part of October, but nothing further was done until we had gotten the revenue agent's report, which was sometime in November, I think November 17, if my recollection serves, of 1948.

Q. At about the time that Davis was negotiating with Mr. Berman with respect to the fee was there any discussion during those meetings with respect to the civil liability?

A. Yes. The discussion as to the civil liability was that the fee which had been discussed of $65,000——

[fol. 172] Mr. Corbin: May I have the time and place of this conversation fixed?

The Court: Well, finish that and then Mr. Heffron can ask that. Finish the answer.

The Witness: During the course of the discussions as to the fee which would be paid for the elimination of the criminal prosecution it was specifically told to Berman and myself that that fee had no bearing at all on what the ultimate tax liability was; they were not concerned with it; that all they were being hired to do was to eliminate criminal prosecution. However, Mr. Berman said, "In the event that you are able to eliminate criminal prosecution I would certainly want to give you a chance to then work on the civil tax case." Now, I can't recall which specific meeting that had been said at, but it was said at one of the meetings.

. . . . . .

Q. Did you hear from Mr. Davis during 1950?

A. I don't think I heard from him in 1950.

Q. Did you hear from him in 1951?

A. I believe I did hear from him in 1951 toward the tail end of the year. It would be either late in 1951 or early in 1952, when Mr. Davis came to my office with Mr. Halperin to say that in connection with the Pattullo case about which I had read in the newspaper, that it was all a lot of fanfare, that the thing was going to be blowing over, that there was nothing to be concerned with and just relax with it; that they had not spoken about the Gotham case and they were sure if everybody was silent that the whole thing would blow over in a short time.

Q. Now, who was "they"? Who said that, Mr. Davis or Mr. Halperin?

A. Mr. Davis said it. Mr. Halperin echoed it. I think it was—in other words, they both said it, each one in a different way at the same meeting.

Q. Did you see Mr. Davis and Mr. Halperin after that?

A. Yes, I saw Mr. Davis and Mr. Halperin after that [fol. 173] again I would say sometime before March 15 of 1952. I would place it somewhere in February. At that meeting Mr. Davis and Mr. Halperin again said that this Pattullo case was still floating around in the papers, that their own books had been subpoenaed and examined, and that in the event that anybody were to come to speak to Berman or myself to refer them to Davis as Berman's attorney and for him to answer all of the questions.

Mr. Halperin said that he had done Berman a very good turn in the handling of his own tax case and he certainly wanted to ask Berman not to hurt him by talking in connection with the tax case now.

Q. Did Halperin say anything else?

A. Halperin said—I can't recall.

Q. Did you see Mr. Davis after that?

A. I saw Mr. Davis after that. This would be after March 15. Mr. Davis advised me that the Pattullo people had gone into the grand jury and had told about the handling of the Pattullo case by Mr. Davis and Mr. Halperin; that he was afraid that since the Berman case had been handled by the same people at about the same time, that this case was also going to be coming up for examination or for action, and that, he asked Berman and myself to please not say anything.

The Court: Not say anything to whom?

The Witness: Instead of—not say anything, to please not talk about the case.

The Court: To anybody?

The Witness: To anybody who would approach us in connection with it.

Q. Did the name of Henry Grunewald come up at this meeting?

A. I asked Mr. Davis whether Grunewald was the man who was involved here and he said, as he had told me before, "It is none of your business."

Q. Did you see Mr. Halperin after that?

A. I saw Mr. Halperin probably a day or so after that [fol. 174] and Halperin too, told me that the Pattullo people had been before the grand jury and had testified with respect to the handling of their tax case, that it was a terrible thing for them to have done, that he hopes that Berman wouldn't do the same thing to him because he had done Berman such a good turn; it would be a terrible thing. He said he had been in touch with the Washington associate and that he was going to stand silent, Halperin was going to stand silent and he hoped that Berman and I would likewise do the same thing. He pointed out that whereas the Pattullo people had an open tax year, where they could have been, that the Government could have used a club to get them to testify by virtue of that open tax year, that that wasn't the case so far as Berman was concerned.

* * * * * * *

Cross Examination.

By Mr. Singer:

Q. Mr. Berman testified yesterday that after Mr. Davis was retained; he, Mr. Louis Berman, procured from his brother, Philip, additional papers which had not yet been shown to Ronayne or you. Did you ever see any such papers?

A. My recollection is that I had seen those papers. But may I qualify that?

Q. Certainly, qualify it. Tell me the story.

A. My recollection is that I had known about those papers. Mr. Berman had told me about those papers.

Q. But the fact of the matter is, knowing about them was one thing, but you had not actually seen them?

A. I can't say that I had seen them at that time.

Q. So far as you know, Mr. Ronayne had not seen them?

A. So far as I knew, I can't say what he had or had not seen.

Q. He never discussed them with you, did he?

A. Mr. Ronayne was handling this pretty much on his own.

Q. Before Mr. Berman and you ever talked to Mr. Davis,

did you prepare a schedule showing pattern payments or [fol. 175] pattern transactions, I think you called it?

A. Yes.

Q. Had you ever done that?

A. I don't believe so.

Q. Whose idea was it that a schedule should be prepared showing a sample or pattern of this transaction? Was it Mr. Davis's?

A. I can't say whether it was Mr. Davis's, mine or Mr. Kuehl's.

Q. But certainly such a statement was never submitted to the Treasury Department until after you had talked to Davis. Isn't that right?

A. I believe that is so.

. . . . . .

Q. Now, for the first time, as I have it, either you or Mr. Davis or Mr. Kuehl made a suggestion that "If you have some proof, show it to us." Is that right?

A. That is correct.

Q. Now for the first time you went out from your own office and based on memoranda that you could see, you prepared an honest statement showing the pattern of the transactions?

A. That is correct.

Q. It was only after such a pattern or statement or pattern of transactions was submitted that Mr. Kuehl or the special agents' office determined that no prosecution should follow. Isn't that right?

A. That is correct.

Q. Am I correct also in assuming that when you submitted this statement, you also submitted the supporting papers, this memorandum I think you told Mr. Heffron, in the handwriting of——

A. I am not quite sure of that.

Q. But you had that, didn't you?

A. I had it. That is what I based the preparation of the statement on.

Q. Did you show that to Mr. Kuehl at this conference or at any conference, these supporting papers?

A. I believe at some point we had it.

Q. I don't know whether your answer——

A. Perhaps my answer isn't responsive. I believe that at some point I had all of those documents before preparing [fol. 176] the schedule, and I would have had them and did have them with me when we went to that conference with Mr. Kuehl.

Q. Now, did you show them to Mr. Kuehl or Mr. Mullenbach?

A. I believe that I did, but I cannot say that I did.

Q. Now, talking about these supporting documents, am I correct in saying that an accountant only takes figures from books or records?

A. That is correct.

Q. And you just don't put things down on a statement that come from thin air; you look for an original record of some kind or some memorandum or some invoice from which you can get this information in order to prepare any statement that you make?

A. Generally speaking, I would say that is correct.

Q. Now, do you remember asking Mr. Louis Berman to ask his brother Philip Berman to give him or get to you these supporting papers?

A. I don't remember asking such a question.

Q. Now, do you remember the name of the firm from whom these slips or memoranda came?

A. Yes.

Q. What was the name?

A. I. Frank.

Q. And that was a meat company here I assume in Manhattan?

A. That is right, sir.

Q. And to get the situation accurate as best we can in your memory, there was produced for your inspection and turned over to you, as I understand it, slips from I. Frank showing certain under-the-table payments by Gotham Beef or for or in behalf of Gotham Beef or Gotham Ship Purveyors?

A. That is right.

Q. I would, if I thought you should, but you didn't go out to I. Frank Company to verify the accuracy or truthfulness or even the genuineness of these supporting papers, did you?

A. Mr. Singer——

Q. You didn't do it?

A. I would have been thrown out of I. Frank so fast if I went there with anything like that, there would be no point at all trying it.

[fol. 177] Q. One other question in that regard: It wasn't Mr. Davis who brought these papers to you, was it?

A. Certainly not.

Q. It wasn't Mr. Davis who suggested the creation of said papers?

A. No, certainly not.

Q. It wasn't Mr. Halperin who suggested that only papers should be given to you so that you could act on them?

A. Certainly not.

Q. If, and I don't suggest that there was, if there was anything wrong with these papers, it was Berman who had given them to you, isn't that right?

A. There was nothing wrong with those papers.

Q. We are sure of that?

A. That is right.

. . . . . .

Q. You say when that power of attorney was signed there was no fee agreed upon at all?

A. That is correct.

Q. At that time, if I understand you correctly, you had not yet seen Mr. Halperin?

A. That is correct.

Q. He had never talked to you in his life?

A. That is right, sir.

Q. I assume I am correct in saying you didn't even know such an individual existed?

A. That is right, sir.

Q. And on the same day, you say, this same day, August 3, there were signed these contingent statements which are Government's Exhibit 23, is that correct?

A. I believe they were signed on the same day.

Q. You keep saying you believe. Now, before on direct examination you said that they were signed on the same day. Why do you say now that you believe?

A. I say I believe because they would have been prepared and submitted at about the same time, and yet I see no dates on this.

Q. So that actually, sir, there is a doubt in your mind as to whether or not Exhibit 23, the contingent statements, were signed and prepared on August 3, when the powers of attorney, Exhibits 17 and 18, were signed, isn't that so?

[fol. 178] A. Well, I will say I think they were, but I will have to concede that there is some doubt.

Q. Now, knowing that there was a doubt, you still were willing to testify on direct examination that they were all signed at the same time? Why didn't you give us that doubt in your direct examination? We were entitled to it, weren't we?

Mr. MacMahon: I object to arguing with the witness.

The Court: Yes. How many questions are you asking. You may read the first question and then we will have an answer to that.

(The question was read as follows: "Q. Now, knowing that there was a doubt, you still were willing to testify on direct examination that they were all signed at the same time?")

The Court: Answer that.

The Witness: I still believe that they were signed at the same time.

Q. But you still say there is a doubt about it?

A. I still say there is a doubt.

Q. Now, I say, knowing that there was a doubt, did you express that doubt in response to the United States Attorney's question? Did you?

A. I think you know that I did not.

Q. Now, let us go to the second one. At the time these papers were signed, Exhibit 23—first let us assume it was August 3; let us assume that it was August 3, even though you say there is a doubt. There was——

A. I am sorry, would you start this over? I must have gotten lost.

Q. Assuming, although you say there is a doubt——
A. Are we now talking about——
Q. Exhibit 23, the contingent——
A. Contingent statements.
[fol. 179] Q. Contingent statements were signed on August 3, there was no contingent fee set on August 3, was there?
A. There was no fee set.
Q. There was no fee whatever?
A. That is right.
Q. And there was nothing crooked or wrong about Exhibit 23, the contingent statement? As far as you know?
The Court: Objection sustained.
Mr. Singer: I respectfully except.
The Court: Exhibit 23 shows that it was filed on a certain date. Now, if you ask whether there was anything wrong about signing such a thing on that date, that is one thing, but you are talking about this exhibit which shows that it was filed in the Collector's office after this witness says there was a contingent fee arrangement.
Mr. Singer: Now, let me come to that. I must take it at the time it was signed.
The Court: All right.
Q. When it was signed was it a lie?
A. No, sir.
Q. Now, that is what I want to know. Now, let us see, when it was filed on November—what is that date, November 7?
A. November 9.
Q. November 9, was it a lie?
A. I don't know what the situation was on November 9.
Q. Let us see whether it was a lie on November 9. You say on the criminal case you had agreed to pay or your clients had agreed to pay $65,000?
A. Yes, sir.
Q. That was contingent upon the criminal case and the criminal case alone, isn't that right?
A. Yes.
Q. And I think you testified today that before the end of October 1948 you had been told yourself to your very

face by the Internal Revenue Department that there was no longer any criminal prosecution contemplated, isn't that right?

A. That is correct.

[fol. 180] Q. So that on November 9 there was no longer any contingent fee, was there? The contingent fee had been paid? Isn't that right?

A. The contingent fee had been paid.

Q. And there was no contingent fee now existing at all on November 8th, isn't that right?

A. On November 9 there was no fee.

* * * * * * *

Q. On that subject of doing wrong, when you were present and Halperin or Davis suggested the payment of the $60,000 in cash as part of the fee, you did not believe that that was wrong as a crime, I mean so far as you know?

A. It was not.

Q. If you had, you would not have permitted it, at least in your presence?

A. That is correct, I would not have permitted it.

Q. At the time there was a discussion—and I don't want to go over the details—about an associate in Washington who had a favor or favors that he could grant, this semi-retired public official, nothing was said by Halperin or Davis in Halperin's presence that would indicate to you that there was something corrupt being planned. Is that right?

Mr. Heffron: That of course is for the jury to decide.

The Court: I will allow the witness to answer whether he gathered the impression from anything that was said to him that there was some corrupt motive in this.

Q. Was there?

A. There was no such thing.

Q. If there had been, you would not have permitted it?

A. That is right.

Q. When the $47,500 was brought, as you described, to Mr. Davis's office and wrapped up in this package, nothing was said that would lead you to believe that there was anything corrupt about it. Is that right?

A. That is right.

[fol. 181] Q. When you made this arrangement for the money to be held in escrow, as you say, by Greenstein and Halperin, as far as you believed, there was nothing corrupt in that arrangement?

A. That is correct.

* * * * * *

Q. I think you said that after 1948, this party up at your house, that outside of just passing Mr. Halperin, you did not see him again until sometime in 1951 or 1952. Is that right?

A. I believe that is correct.

Q. Mr. Halperin's relationship to your clients, so far as you knew or were told, ended when criminal prosecution was declined by Mr. Kuehl. Isn't that right?

A. So far as I knew, Davis was still continuing on the case. Now, what Davis's relationship had been with Halperin, I cannot say.

Q. But so far as you knew—I am only limiting it to your knowledge—your had no further discussion with Mr. Halperin about this matter?

A. That is correct.

* * * * * *

Q. This first time then was early January 1952. You say Halperin came with Davis to your office?

A. That is right.

Q. Who was there besides you?

A. I think Davis, Halperin, myself. Berman may have been there, but I am not sure.

Q. When you spoke of Berman, do you mean—

A. Louis.

Q. But you are not sure about that?

A. No.

Q. And the conversation took place. Now, relate it to me.

A. Mr. Davis said that he presumes we have read in the newspapers about the Pattullo Modes case. He said, "There is nothing that you have to be concerned with. They don't know anything about the Gotham or Berman case. The whole thing is a political hullabaloo," and

that the King Committee is just trying to get a lot of [fol. 182] publicity, that the whole thing will blow over, and not to be concerned with it.

Q. That was the sum and substance of that conversation?

A. That was approximately what was in that conversation, yes.

Q. At that time when Mr. Halperin was present—am I right that he was there?

A. I believe he was.

Q. Do you remember that he was there?

A. I recall his being there.

Q. Did Mr. Halperin say to you or did Mr. Davis say to you in his presence that if you were to be asked about it, you should tell a lie?

A. No, sir

Q. Did they ever suggest to you that in any fashion you should lie about the matter at this particular meeting you speak about?

A. No, sir

Q. Then there came a second time when you say you saw Mr. Halperin?

A. Yes.

Q. I assume that would be in February or March?

A. I would say it was sometime in February.

Q. Was it Mr. Halperin alone or Mr. Halperin and Mr. Davis?

A. I again think it was Mr. Davis and Mr. Halperin.

Q. Were you alone there or was Louis Berman there?

A. I was probably there alone.

Q. Again, it was at your office?

A. Yes, sir, though I must say this. We did move from my office to restaurants and back. So in discussing the meetings, it would have been either at my office or in the restaurant.

Q. Mr. Merdinger was not present?

A. I don't believe he was.

Q. At this second meeting, did Mr. Halperin ask you to lie?

A. He did not.

Q. Did Mr. Davis in Mr. Halperin's presence ask you to tell a lie?

A. No, sir

Q. Now we come to the third meeting, which you know as you fixed by a focal date is after March 15th. That we know?

A. Yes, sir.

[fol. 183] Q. Up to this time you had not discussed the matter with any lawyer, had you?

A. No, sir

Q. Mr. Kolbrener and Mr. Kotler had not been brought into the situation, had they?

A. No, sir.

Q. Now, you came to a time when you had a third discussion?

A. Yes, sir.

Q. I think you said that this time Mr. Halperin was there alone. Am I correct?

A. That is right.

Q. I am relying on my memory too. This again was at your office. Is that right?

A. That is right.

Q. And it was just you and Mr. Halperin?

A. That is my recollection.

Q. It was this time at least that Mr. Halperin said, among other things, that he had done Louis Berman a favor?

A. Yes, sir.

Q. Incidentally, was Louis Berman present at the second of these discussions?

A. I believe Mr. Berman came in at the tail end of some of the discussions. I can't place which one.

Q. But he was not here at the third discussion after March 15th?

A. I don't believe so.

Q. On this occasion of March 15th—

A. Not March 15th.

Q. After March 15th, you are right.

A. Yes, sir.

Q. Did Mr. Halperin ask you to lie?

A. He did not.

Q. Did you already have an attorney by then?

A. I don't believe so.

Q. Did Mr. Halperin at any time when he talked to you, or in his presence was mention ever made of refusing to testify on the ground of self-incrimination?

A. Not in those words.

Q. Or a suggestion along that line?

A. Yes, sir.

Q. You knew Mr. Halperin was a lawyer?

A. Yes, sir.

Q. So you say now, along the lines of refusing to answer on the ground of self-incrimination, some such statement was made by Halperin or Davis when you were there?

A. I am not quite sure how specific you are trying to make that.

[fol. 184] Q. I am not trying to make it specific.

A. There were discussions. There were requests by Mr. Halperin that Berman and I do not talk, that it would be a bad thing for him and it would be a bad thing for Berman. He did not use any legal phraseology such as "Stand on the Fifth Amendment or refuse to answer on constitutional grounds," or anything like that. But he did say that he hoped that Berman and I would not discuss this case with authorities.

The Court: That you would not talk to the grand jury?

Q. Grand jury was not mentioned, was it?

A. Grand jury as such was not mentioned.

The Court: That is just what I was wondering.

Q. There was no subpoena for you yet?

A. No, sir.

Q. You had not been called before the King or Kean Committee, had you?

A. No, that came a year later.

Q. That was the last time, as I understand it, that you ever spoke to Mr. Halperin about this matter?

A. I believe so.

LEO GREENSTEIN, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

Mr. Heffron:

Q. What is your occupation, Mr. Greenstein?
A. I am a C. P. A.
Q. Are you associated with a firm?
A. Yes, sir.
Q. What is the name of it?
A. Weisberg, Greenstein & Gassman.
Q. Where are they located?
A. 1440 Broadway, New York.
[fol. 185] Q. Have you received any promises from the Government with respect to your testimony?
A. Yes, sir.
Q. And what have they been?
A. That if I truthfully tell the story that I would not be harmed here in any way.

* * * * * * *

Q. Now, did you have a conversation with Harry Merdinger?

A. I had a conversation with Mr. Merdinger sometime in June 1948 and during the course of that conversation I learned that one of his clients had some tax difficulties, that they were not quite satisfied with their counsel, and during that conversation I recommended the firm of Schopick & Davis to him.

Some ten days or two weeks later I received a telephone call from Mr. Monroe Tobias whom I had never met before, but he introduced himself to me over the telephone. He told me that he was a partner of Harry Merdinger's and asked me for the telephone number of Schopick & Davis, which I gave him.

Q. Now, did you thereafter have occasion to see Mr. Davis in connection with the call you had previously received from Tobias?

A. Yes, sir. About a month later I was called over to the office of Schopick & Davis. I think Mr. Davis's secretary

called me or he called me, I don't recall which, and Mr. Davis told me that he had been retained by the Gotham people.

Q. Was anyone else present at this time?

A. Yes. Mr. Halperin was there and Mr. Davis.

Q. Do you know Mr. Halperin?

A. Yes, sir, I do.

Q. Do you see him in the courtroom?

A. Yes. That is Mr. Halperin (indicating).

Mr. Heffron: May the record indicate, your Honor, that the witness had identified the defendant Max Halperin.

The Court: Yes.

Q. Will you relate what happened at this conference?

A. Mr. Davis told me that he had been retained by the [fol. 186] Gotham Beef people and there was an obstacle and that was the reason why he called me over to the office, and he said the obstacle was this: that the Gotham people insisted that I act as a joint escrow holder of a cash contingent fee for a Washington correspondent of the attorneys.

Q. Of which attorneys?

A. Of Mr. Davis, Mr. Schopick and Mr. Halperin. I objected and said I didn't want the responsibility, especially since it was cash, and I asked Mr. Davis, I recall, why it had to be cash, and why not a checking account in Mr. Halperin's and my name, or, at least, why couldn't a certified check be put up, a joint certified check in Mr. Halperin's and my name, and Mr. Davis told me that wasn't possible, that unless it was cash, if it were any other source, it was attachable by creditors or otherwise, and that the Washington correspondent if he succeeded in accomplishing his mission would want to make sure that he got paid, and that is why it had to be cash, and I accepted the assignment.

Q. Were you told what the Washington man's mission was?

A. Yes. That his job, his mission, whoever he was, was to try to stop a criminal prosecution against the Gotham people, the Bermans.

Q. Did you act as such escrowee?

A. I took the assignment.

Q. What did you do after that?

A. Approximately, I think it was around the middle of September when I got another call from Mr. Davis's office to come over, and I went over there, and I had to wait in the anteroom for a while, I recall. Then I went into—I was called into the office that Mr. Halperin was occupying, and Mr. Davis was there, Mr. Irving Davis, Mr. Halperin, Mr. Tobias, and Mr. Louis Berman. I was introduced to Mr. Tobias and Mr. Louis Berman, and Mr. Tobias said to me, "Do you understand the terms of the escrow? That a cash fee will be put up? You will be expected to open up a joint vault with Mr. Halperin and that under no conditions are you to release this cash fee unless I authorize it"? [fol. 187] And I said I understood, and with that either Mr. Tobias or Mr. Berman handed me a package. It was wrapped in brown paper, I think it was with cord, and I would say it was about 15 or 18 inches by about 10 or 12 inches wide and a couple of inches thick. It was handed to me in the presence of the others. I handed it to Mr. Halperin who immediately put it into a briefcase and we left.

Q. Where did you go?

A. We left the office and proceeded—I think we had a conversation as to where we would open up a vault, and it probably was my suggestion that we open it in the Trade Bank on 48th Street right off Fifth Avenue. We walked over to the bank. We applied for a vault, signed the necessary papers, and Mr. Halperin paid a cash fee, I think it must have been somewhere around $20. We got the vault, and Mr. Halperin took the package out of his briefcase and put it in the vault. Then we left.

Q. Did you have occasion to go back to that vault?

A. I think it was about a month later when I got a telephone call from Mr. Tobias, who said to me, "Leo, I am satisfied that you can now release the cash fee to Mr. Halperin. I authorize you to do it."

I either got in touch with Max Halperin or Max got in touch with me. We went down to the Trade Bank and we opened the vault. Mr. Halperin, I remember, took the package out, and I think he put it in a briefcase and said he was going to deliver the fee to his Washington correspondent or associate. We left the bank. I would say about three or four weeks after that I again went down to the bank and this time asked for a refund on the vault and I think

I got some seventeen or eighteen dollars back which I turned over to Mr. Halperin subsequently.

* * * * * * *

Q. Do you recall the time the Brooklyn Grand Jury was in session?

A. I recall that. That was around March, 1952.

[fol. 188] Q. Directing your attention to those time periods, did you have occasion to see Max Halperin?

A. Surely I saw Max Halperin.

Q. Did you have any conversations with him respecting either the Committee or the grand jury?

A. In the grand jury I remember we were very unfortunately sitting out a great deal and waiting to get called, and I remember that I spoke to Mr. Halperin at various times, and he told me, while we were walking around the corridors, that he was not going to discuss this matter before the grand jury, that he thought it was the wisest and the smartest thing to do; and, as a matter of fact, as an attorney, he thought it was the smart thing for everybody to do.

* * * * * * *

Cross Examination.

By Mr. Singer:

Q. Let me go back now to 1952. In 1952 you remember that you were subpoenaed before the grand jury. Is that correct?

A. That is correct.

Q. I think you testified on Friday that you were there a number of days?

A. Several days.

Q. Waiting to be called?

A. That is correct.

Q. And that while you were waiting to be called, Mr. Halperin was also waiting to be called?

A. Max was there, too.

Q. And that the two of you did work or talk together?

A. Yes, sir.

Q. And that during that time Mr. Halperin said to you in substance, as a lawyer, wasn't going to say anything and that, as a matter of fact, as an attorney, he thought it was the smart thing for everybody to do?

A. It was the smart and wise thing for everybody to do.

Q. He said, and I quote from your language exactly at page 4570, "As an attorney, he thought it was the smart thing for everybody to do"?

A. That is correct, Mr. Singer.

Q. On that very subject, did Mr. Halperin tell you to tell a lie to the grand jury?

A. He did not.

[fol. 189] Q. Did Mr. Halperin ever tell you to conceal the fact that you were an escrowee?

A. No, sir.

Q. Did he ever tell you to impede an investigation?

A. No, sir.

Q. Or to conceal anything except he said as a lawyer he thought the smart thing to do was not to say anything before the grand jury?

A. That is correct.

Q. As a matter of fact, when he said that to you, you were represented by a lawyer named Safir. Am I correct?

A. That is correct.

Q. Am I correct in assuming Mr. Safir independently gave you the same advice?

A. I didn't agree with him, but that was the advice he gave me.

. . . . . .

Q. Was what you should do discussed, whether you should look for immunity or not discussed?

A. Yes.

Q. Did Tobias express an opinion on it?

A. Mr. Tobias said that he would engage an attorney and would go along with what his attorney advised.

Q. And you said the same thing?

A. Exactly.

Q. And Mr. Davis: what did he say?

A. Well, Mr. Davis originally came in and was going to get immunity for everybody.

Q. It was Mr. Davis who said he was going to get immunity for everybody?

A. He was going to try. I am sorry, I would like to add that.

Q. Did he include himself when he said everybody?

A. I believe he did.

Q. And that was all that happened at that conversation?

A. That is correct.

Q. There came a time a few days later when, as you described, you were told by your lawyers that the United States Attorney in Brooklyn was agreeable to give you immunity, is that right?

A. It was at my prompting, Mr. Singer: I threatened to by-pass my attorneys on this.

[fol. 190] Q. You mean you suggested it yourself?

A. I threatened to by-pass them. I had no intention of——

Q. You suggested it yourself?

A. Yes.

Q. Mr. Halperin hadn't suggested it?

A. Mr. Halperin had nothing to do with it.

Q. You did that all alone?

A. That is correct.

Q. Now, after you had been given promise of immunity did you talk to Tobias before you went to the grand jury?

A. No, sir.

Q. No discussion whatever?

A. Not to my recollection.

Q. Now, did you testify before the grand jury in Brooklyn about the incident which occurred sometime in September 1948 in Davis's office with the package?

A. Yes.

Q. Do you remember that incident?

A. Yes.

Q. Did you testify about that incident?

A. You mean in Brooklyn?

Q. Yes.

A. Yes.

Q. Now, had you discussed that incident with Tobias before you testified about it?

A. You mean in Brooklyn?

Q. Yes.

A. No, sir.

Q. Or in Manhattan? I don't care where you talked.

A. Oh, later on I think I did discuss it with him.

Q. Did Tobias every say to you that you were in the room when money was counted, and that Halperin came in after the package was tied up?

A. No, sir.

Q. Nothing like that occurred?

A. No, sir.

Q. The fact of the matter is you insisted that you never saw any cash money?

A. That is true.

Q. All you saw was a package?

A. That is true.

Q. The amount of money in it was never told to you?

A. It was not.

Q. So you didn't see a single dollar?

A. Not even a cent.

* * * * * *

Q. Now, some time passed, about a month?

A. That is right.

[fol. 191] Q. Tobias telephoned you, you said, and he said in substance that he was satisfied, and he authorized you to release the cash fee?

A. That is correct.

Q. Then you and Halperin went to the bank to get it?

A. That is right.

Q. You opened the box together, is that right?

A. That is right.

Q. In the box was the same package, as far as you know?

A. That is correct.

Q. That you had left there a month earlier?

A. That is correct, Mr. Singer.

Q. And as far as you know there was nothing in the box but that one package solely, and that one package alone?

A. That is right, as far as I know.

Q. No money, no cash that was visible?

A. I didn't see any cash, except the package.

Q. And Halperin then took the package and you left?

A. That is right.

* * * * * *

Q. As I understand this arrangement originally, and stick to the original arrangement, the purpose of the two people handling the box was that one couldn't go into it without the other?

A. That is correct.

Q. Did you actually make such an arrangement at the bank?

A. It was a joint vault, Mr. Singer.

Q. Where are the records on it?

A. I wouldn't know.

Q. Have you ever seen them?

A. When we opened up the box.

Q. Have you ever seen them since then?

A. I identified some——

Mr. Singer: You did identify a record. May I have that record?

Mr. O'Hara: We will get it right away.

Q. Before they bring it to me, tell me from your best recollection—you remember so well other things—would [fol. 192] you say now, under oath, after sober reflection that this record would show that entry to the box could only be made by both of you and not by either one?

A. As far as I can recollect, Mr. Singer; it was a joint vault, and neither one of us could open it without the other. That is my recollection.

Q. What record did you see, my friend, when you say you saw a record that refreshed your recollection?

A. Back in 1952, before the Brooklyn Grand Jury.

Q. What kind of a record did you see?

A. I don't recall, but I saw some bank records.

Q. Was it a signature card?

A. I don't know.

Q. You have a box of your own, haven't you?

A. Sure.

Q. I don't want to know what is in it; it is none of my business.

A. I will tell you, Mr. Singer.

Q. I am not interested.

A. O. K.

Q. Don't you know that there is a regular contract form you sign when you rent the box? Isn't that right?

A. That is right.

Q. Aren't the terms on that box as to whether it can be opened by either or it must have both people who are named?

A. Yes, I would say so.

Q. Would you say that the receipt for the box would be issued in the name of both people?

A. Sure.

Q. So that if the receipt in this case was issued only in your name, it would not be the box we are speaking of. It must be some other box?

A. That is right.

Q. And you are certain, are you not, that the receipt for this particular box is issued in both your name and Mr. Halperin's?

A. Mr. Singer, the box was a joint box——

Q. Look, my friend, you will not divert me. I ask you whether the receipt for that box is in your name and Mr. Halperin's name. I want an answer.

The Court: Do you know?

A. I don't know.

[fol. 193] Q. But you do say that if the box was in both names, the receipt should be in both names?

A. I would think so.

Q. You wouldn't permit a contract for that box so that either one of you could go to it without the other, could you?

A. No, sir, I would not.

Q. I want you to think about that receipt. Did you surrender the receipt when you got your money back?

A. I don't know what receipt you are referring to.

Q. The receipt for the payment of the funds for the rental of the box?

A. Mr. Halperin probably got that receipt.

The Court: Mr. MacMahon, have you got these papers about the box?

Mr. MacMahon: I am not clear exactly what Mr. Singer is referring to.

The Court: There may be a difference between a receipt for cash and the form.

Mr. MacMahon: Your Honor, the next witness, I might say, will be the man from the bank, who probably knows more about these things than this witness.

The Court: Let Mr. Singer see them.

Mr. MacMahon: See what?

The Court: Let me see them first if there is any question.

(The documents were handed to the Court.)

The Court: Mr. Singer, do you want to look at these things?

Mr. Singer: Yes, sir.

(The Court handed document to Mr. Singer.)

The Court: Here is another page, which apparently shows the receipt of cash by the safe deposit company for rental. Here is a document called Box History, and a [fol. 194] debit slip for a refund from the box (handing to Mr. Singer).

Mr. Singer: I would like to have this paper marked for identification.

(Marked Defendants' Exhibit H for identification.)

Q. I show you Defendants' Exhibit H for identification and I direct your attention——

The Court: Ask him whether he has ever seen it before. That is the first thing.

Mr. Singer: I am terribly sorry, your Honor.

The Court: All right, what is your question?

Q. I show you Defendants' Exhibit H for identification (handing). I direct your attention to the first entry which apparently has a circle and a red cross in front of it. Have you ever seen that record before?

A. I don't recall, Mr. Singer. I may have.

Q. Does it refresh your recollection that this box was taken out in the name of Max Halperin or you, Leo Greenstein?

A. That is what it says on the card.

The Court: Was the box taken out in that form?

Mr. Singer: I object to your Honor's statements.

The Witness: The box was not taken out in that form.

Mr. Singer: I object to your Honor's comment.

The Court: Objection overruled. I want to get the facts, too.

Mr. Singer: I respectfully except.

The Court: All right, you have an exception, but we are interested in getting the facts.

Mr. Singer: May I respectfully ask your Honor at this time that, as the situation has now developed, I be permitted to exhaust a line before your Honor interferes with my cross examination.

[fol. 195] Mr. MacMahon: May I say that on these records it has not been shown that the witness's recollection needs refreshing.

The Court: What was that last statement you made, Mr. Singer?

Mr. Singer: I said I want an opportunity to exhaust this line before your Honor interfered with my cross examination.

The Court: I don't think I am interfering with your cross examination. The witness had been making various statements. I wanted everybody to know what the facts are.

You may proceed, Mr. Singer.

Q. You just testified that the record shows that the box was taken out in the name——

The Court: Objection sustained. The record is not in evidence.

Mr. Singer: Will your Honor permit me to finish my question?

The Court: No.

Mr. Singer: I am not going to quarrel with you——

The Court: The question is objectionable——

Mr. Singer: I am not going to quarrel with your Honor but I want to point out very respectfully on the record that I have been stopped from completing my question, and I want the same right——

The Court: But the question is objectionable in form as assuming that this record is in evidence. It is not in evidence.

Mr. Singer: I want the same right to arrest a question when I believe the question is objectionable.

The Court: You may proceed.

Mr. MacMahon: Your Honor——

The Court: No, let Mr. Singer proceed.

[fol. 196] Q. What did you testify a moment about that record?

The Court: Objection sustained. The record can be read. If you want the answer read back, it can be read back.

Mr. Singer: May I have these other three papers marked for identification?

(Marked Defendants' Exhibit I for identification.)

Q. Was it two months after you opened the box that you closed it?

A. Yes.

Q. How do you know that?

A. That is the best recollection.

Q. Didn't you just refresh your recollection from this very paper, Defendants' Exhibit H?

A. As a matter of fact, I didn't even look at that part of it.

Q. You say you didn't look at this entry when I showed it to you?

A. I just looked at the joint names there.

Q. When you take out a box in a bank, don't you sign a signature card?

A. Yes, sir.

Q. And isn't that signature card left at the bank?

A. Yes, sir.

Q. I show you Defendants' Exhibit H and Defendants' Exhibit I for identification. Do you see a signature card with respect to this bank vault we are speaking of (handing)?

Mr. MacMahon: Your Honor, the records speak for themselves.

The Court: The records speak for themselves. Those are not signature cards.

Mr. Singer: There is no signature card.

The Court: Those documents are not signature cards.

Mr. Singer: That is right.

Q. Looking at these papers, Defendants' Exhibit H and I for identification, has your recollection been refreshed about this receipt?

A. No.

[fol. 197] Q. Whether the receipt was issued to you indi-

vidually, to you and Halperin together, or to Halperin alone?

A. I am sure it was issued to Halperin and myself.

Q. You are positive?

A. Positive.

(Marked Defendants' Exhibit J for identification.)

Q. I show you a paper marked Defendants' Exhibit J for identification. Will you look at it (handing)? Is that the receipt for the box we are talking about?

A. It seems to be.

Q. Would you like to look at Exhibits H and I for identification to make certain?

A. Well, this particular receipt——

Q. Would you want to look at these——

A. Well, let me look at them.

Q. To make certain this is the box we are speaking of, the one box that you have mentioned in this matter (handing)?

A. Yes, that is the same box.

* * * * * *

Q. What happened to the signature cards that were signed and you say were left at the bank? Do you know?

A. Of course not.

Q. Did you ever get the signature cards back?

A. Not to my knowledge.

Q. I want to know whether your ever got the signature cards back.

A. No, sir.

Q. So that when you left the bank at the time you opened the box, you left a signature card and a card I assume that was signed by Mr. Halperin, Isn't that right?

A. Yes, sir.

Q. You were the last one at the bank about this box, weren't you, so far as we know?

A. To get the refund.

Q. So that when you went back to get the refund, Halperin was not with you?

A. No, he was not with me.

[fol. 198] Q. So that I am correct that you were the last

one at the bank in connection with this box. Isn't that right?

A. Yes, I got the refund. I was there.

Q. And you got the refund and, so far as you know, the signature cards were still at the bank?

A. So far as I know.

Q. The contract which had been signed for renting the box was still at the bank?

A. I don't know. I suppose it was.

Q. You did not take it with you?

A. I should say not.

* * * * * *

WILLIAM G. BAUM, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Miss Goldman:

Q. Mr. Baum, what is your home address?

A. 875 West End Avenue.

Q. What is your occupation?

A. I am an assistant vice president of the Trade Bank Safe Deposit Company.

Q. How long have you been with the Trade Bank Safe Deposit Company?

A. This is my 26th year.

Q. Are you familiar with the books and records of the 48th Street Branch of the Trade Bank Safe Deposit Company?

A. Yes.

Q. Mr. Baum, I show you Defendants' Exhibit H and I ask you whether you can tell the Court and jury from this document whether Max Halperin was present at signed at the opening of box No. 1377?

A. Yes.

Q. And was he present?

A. To my knowledge, yes.

Q. Now, Mr. Baum, have you brought with you certain books and records of the bank pursuant to a subpoena duces tecum?

A. Yes.

Q. Was it the usual practice of your bank to keep any other records in connection with safe deposit boxes?

A. Yes.

[fol. 199] Q. What are they?

A. You mean other than what I produced?

Q. Yes.

A. There are signature cards and a ledger card.

Q. Where is the signature card for box No. 1377?

A. We haven't the remotest idea.

Q. Have you caused a search to be made for it?

A. Yes.

Q. And what was the result of that search?

A. We couldn't find it.

Q. Does your bank keep records of visits to the boxes by owners?

A. Yes.

Q. What do you do with such records?

A. We keep them for a very short time; then they are destroyed.

Q. For how long a period of time do you keep them?

A. Six months, a year.

Q. Is it the regular course of your bank business to destroy those records?

A. Yes. Because they are only for our private information.

The Court: How long do you ordinarily keep signature cards?

The Witness: Permanently.

The Court: Are all the other signature cards about that time still in existence? Are you able to find them?

The Witness: Yes.

The Court: But this particular signature card is gone?

The Witness: We can't find it.

Miss Goldman: No further questions.

The Court: You may cross examine.

Cross Examination.

By Mr. Singer:

Q. Now, I assume that the records which you produced were those records H and I in evidence, am I right, Mr. Baum?

A. Yes.

[fol. 200] Q. Those were all that you produced?

A. That is right?

Q. Now, there was a man named Tom McGrath that worked for you?

A. Yes, sir.

Q. He was in the vault department?

A. Yes, sir.

Q. Is that right?

A. Yes.

Q. I show you this paper, Defendants' Exhibit J for identification.

A. Yes.

Q. Look at that. Is that on a form used by your bank in 1948, in September?

A. Yes. It is part of a bill that is issued each month when we send out new bills to our customers.

Q. And Mr. McGrath was an employee of your bank, of the Safe Deposit Company of your bank?

A. Yes.

Q. And as such he had authority to sign a receipt if he got a cash payment?

A. Yes.

Q. For a particular rental of a vault?

A. Yes.

Q. Now will you look at that Exhibit J? That refers to box No. 1377, is that right?

A. Yes.

Q. Now, is that the same number of this box which you produced the other records Exhibits H and I, 1377?

A. Yes.

Q. Would you say that that Defendants' Exhibit J for identification was issued as a receipt for the money paid for the rent for box 1377 on September 15, 1948?

A. Yes, that is the date of the rental.

Q. And that would be one of the papers that were issued by the bank in connection with the transaction?

A. Yes, sir.

Mr. Singer: I now offer it in evidence.

The Court: Do you recognize Mr. McGrath's signature on that?

The Witness: I don't know Mr. McGrath's signature, sir, but inasmuch as he signed——

The Court: It seems like the form?

The Witness: Yes.

The Court: It will be received in evidence.

[fol. 201] (Defendants' Exhibit J for identification received in evidence.)

Q. But you put down the terms under which it was rented, whether there is to be access by one or the other or by both together?

A. Yes——

The Witness: Well, your Honor, pardon me.

The Court: Yes.

The Witness: The history card shows the same thing.

Q. And all the other records would show the same thing?

A. Yes.

Q. Now, does the history card show Max Halperin or Leo Greenstein?

A. Leo Greenstein.

Q. Now, when a record like that in your possession shows that a box was rented to Leo Greenstein or Max Halperin, according to your experience and according to the rules of your bank, doesn't that mean that either one could go into the vault without the other?

A. Yes, sir.

Q. And that is what you say was the agreement in this particular case?

A. Yes, sir.

The Court: As far as your record goes access could be had by either one?

The Witness: Yes, sir, for this reason, may I interpolate: If access to the box had to be by both, this would be marked

White Button, which means only two people have access to the box and could obtain the key. We put a white button in one of the key holes and neither one of the parties can come without the other unless they have a letter stating the other party can.

The Court: Your records would indicate that either Mr. Greenstein or Mr. Halperin had access to that box?

The Witness: Yes.

[fol. 202] Milton Hoffman, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

By Mr. O'Hara:

Q. Mr. Hoffman, will you try to keep your voice up? Where do you reside, Mr. Hoffman?

A. 3635 Johnson Avenue, in the Bronx.

The Court: Mr. Aranow is not here. He asked that he be excused for a few minutes to make a telephone call. Is that satisfactory to his client, Mr. Bolich?

Defendant Bolich: Yes, sir.

The Court: All right, go ahead.

Q. Are you presently working?

A. Yes, sir.

Q. In what business are you working?

A. The catering business.

Q. What kind of an educational background do you have?

A. I have an accounting background.

Q. You graduated from high school?

A. Yes, sir.

Q. What accounting courses, if any, did you take?

A. I took four or five years of accounting courses at New York University.

Q. Are you a lawyer?

A. No, sir.

Q. Were you ever a certified public accountant?

A. No, sir.

Q. Has the Government made you any promises in connection with any testimony that you may give?

A. No, sir.

Q. Were you indicted for a conspiracy to defraud the United States with respect to the Gotham Beef and Pattullo Modes tax cases?

A. Yes, sir.

Q. Did you plead guilty to a count in that indictment?

A. I did, sir.

Q. Is that the conspiracy count?

A. Yes, sir.

Q. Have you been sentenced yet?

A. No, sir.

[fol. 203] Q. Some time you were associated with the firm of Schopick & Davis. Is that right?

A. That is correct.

Q. When did that association begin?

A. 1945.

Q. What kind of work did you do there?

A. I started doing OPA work for the firm, and then I was doing tax work for them.

Q. What kind of OPA work did you do, Mr. Hoffman?

A. I appeared at the OPA with applications for price for clients of the office.

Q. Were those applications filed in the name of Schopick & Davis?

A. Yes, sir.

Q. What was the full name of the firm at that time?

A. Schopick, Davis & Sherman.

Q. At that time, did you share in the fees of the firm of Schopick & Davis?

A. I did, sir.

Q. Did you have a salary?

A. I had a percentage arrangement.

Q. You had a percentage of the income of the law firm of Schopick & Davis?

A. Yes, sir.

Q. Do you know Max Steinberg?

A. I do.

Q. When did you first meet Max Steinberg?

A. I would say in 1946.

Q. Do you recall the circumstances of your meeting him?

A. At a ballgame.

Q. Do you recall who introduced you?

A. Yes, sir, a gentleman by the name of Max Auerbach.

Q. Who was he?

A. He was a revenue agent in Mr. Steinberg's squad.

Q. Following the time that you met Mr. Steinberg, did you have occasion to see him frequently thereafter?

Mr. Perry: I would ask that the witness not be led. We are coming to the point in the case where it should be more narrative than led.

The Court: I will sustain that objection.

Q. Following the time that you met Max Steinberg, did you see him again?

A. Yes, I did.

[fol. 204] Q. Over what period of time did you see him again?

A. Over a period of years.

Q. How many years?

A. I would say a couple of years.

Q. What years would those be?

A. 1946, 1947 and 1948.

Q. Did you see him after 1948?

A. Yes, 1952.

Q. Did you see him after 1952?

A. In 1954.

Q. In the years of 1946, 1947 and 1948, on what occasions did you see Max Steinberg?

A. I saw Max Steinberg for lunch. I went to dinner with him——

Mr. Perry: May we specify a more exact date than the year?

The Court: Mr. O'Hara, try to specify the date, but let the witness continue.

Mr. O'Hara: I don't want to lead him.

The Court: You go ahead.

The Witness: In 1946 I went to lunch with Mr. Steinberg. I went to dinner with Mr. Steinberg. I went to the theatre with Mr. Steinberg. I visited his home to watch the prize-fights.

Q. Were there prizefights in Max Steinberg's home?

A. Max Steinberg had a television set, and I went up to his home to watch the prizefights over the television set.

Mr. O'Hara: It is hard not to lead, your Honor.

The Court: That is all right. That was in 1946 the witness said. Did you want to ask him about other years?

The Witness: I am sorry, sir. In 1947 about the same thing except I played golf with him.

Q. You said you went to lunch with him and you went to dinner?

A. Yes, sir.

Q. Was that on just one occasion?

A. On various occasions, sir.

Q. Taking lunch first, on how many occasions in 1946 would you say that you had lunch with Max Steinberg?

A. I can't say, but I would say a number of times.

[fol. 205] Q. How many times would you have had dinner with him?

A. A number of times.

Q. How many times would you have gone to his home to watch television?

A. A number of times.

The Court: What do you mean by a number?

The Witness: More than five.

Q. Are you a member of the Hampshire Country Club?

A. I was.

Q. You are not now?

A. No, sir.

Q. Do you recall the circumstances of your becoming a member of that club?

A. I was invited to play golf there with Max Steinberg, and I liked the club and he said, "Why don't you join the club?"

Q. What if anything did you do about his suggestion?

A. Max Steinberg sponsored me as a member at the Hampshire Country Club.

Q. Did you have occasion to see Max Steinberg at that club thereafter?

A. At the club I saw Max Steinberg on various occasions to play golf, but not too often.

Q. Did you ever have occasion to make any trips with Max Steinberg?

A. Yes, I spent the weekend with Max Steinberg in Swan Lake.

Q. Do you recall what year that was?

A. I would say the summer of 1946.

Q. If you will, please, relate the circumstances as to how the trip came about, where you went, when, and when you came back.

A. One day during the week I asked Max Steinberg if he would like to take a trip to Swan Lake with his wife; that my wife and son were up there, and I was going up; and he said yes, and I picked him up and we drove up. We spent two days there, and we came back to New York.

Q. You say "we" drove up. Who drove up?

A. Mrs. Pearl Steinberg, Mr. Max Steinberg, myself, I think my mother-in-law was there and I think my father-in-law was in the car.

[fol. 206] The Court: Whose car?

The Witness: My car, sir.

Q. In the years 1946 and 1947, what terms of address were used as between you and Max Steinberg?

A. Max and Milton.

Q. Did you know his wife at that time?

A. Yes, I did.

Q. What terms of address were used with respect to her?

A. Pearl and Milton.

Q. Were your families ever together other than this incident of Swan Lake?

A. Yes, we had dinner at the Steinberg home.

Q. That was with Mr. and Mrs. Steinberg?

A. Yes, and then we were at an engagement——

Mr. Perry: May we fix the time of the dinner?

Mr. O'Hara: Yes.

Q. Can you tell us, to the best of your recollection, when it was you and your wife had dinner with Mr. and Mrs. Steinberg?

A. 1946, 1947, 1948.

The Court: In each one of those years?

The Witness: Yes.

Mr. Perry: Was that one occasion or three occasions?

The Witness: It may have been one or two occasions a year at their home.

The Court: One or two occasions each year?

The Witness: In their home, yes, sir, for dinner.

Q. Did Max Steinberg have a daughter?

A. Yes, sir.

Q. Did you ever meet her?

A. I did.

Q. Do you know whether or not she married?

A. She is married.

Q. Do you recall when she was engaged?

A. I do.

[fol. 207] Q. Do you recall whether or not there was any party in connection with her engagement?

A. There was a party at the Pennsylvania Hotel for the engagement.

Q. Is that now the Statler?

A. That is now the Statler.

Q. Did you have anything to do with that party?

A. I did. I helped make——

Q. Tell us what you had to do in connection with that party.

A. I helped make arrangements with Mr. Steinberg for that party.

Q. What kind of arrangements?

A. The meal, the liquor, the hors d'oeuvres.

Q. Do you know whether or not there was a bill rendered by the hotel for that party?

A. There was.

Q. Do you know how that bill was paid?

A. I paid the bill.

Q. What did you pay it with?

A. A check.

Q. Whose check was it?

A. A Schopick & Davis check made payable to me, which I endorsed to the hotel.

Q. Do you know how much that check was?

A. $1500 some-odd dollars.

Q. Did Max Steinberg ever pay you back?

A. He most certainly did.

Q. Did he pay you back by check or cash?

A. He paid me back by cash.

Mr. Perry: Can we fix the dates of this, your Honor?

Q. Do you recall the date of the engagement party?

A. The early part of June 1947.

Q. Did you attend that party?

A. I attended that party with my wife.

Q. How long have you known Max Halperin?

A. Since 1945.

Q. Have you ever had occasion to have any business relationship with Max Halperin?

A. We were in a real estate venture in Kingspoint, Great Neck, Long Island.

[fol. 208] Q. Will you tell us the nature of the relationship there?

A. Mr. Schopick, Mr. Davis, Mr. Sherman, Mr. Halperin, myself, and I think there was another gentleman by the name of Allan Hyman, bought some vacant land in Great Neck, Long Island.

Q. And if I understand that, each invested some part *part* in this?

A. About $2500.

Q. Apiece, is that right? A joint venture they went into together?

A. Yes, sir.

* * * * *

Q. Did there come a time when you heard the name Pattullo?

A. Yes, I did.

Q. Whom did you hear that name from first?

A. Max Steinberg.

Q. Do you recall where you were when you heard it?

A. Yes, I do.

Q. Where were you?

A. At the golf course at the Hampshire Country Club.

Q. Will you please give us in words or substance the conversation you had with Max Steinberg on that occasion as far as it relates to Pattullo?

Mr. Perry: Are you going to fix the time?

Q. (Continuing) And the time also, Mr. Hoffman. Tell us as best you can when it was you had the conversation, and relate the rest.

A. The time, I would say, to the best of my recollection, would be some time in May of 1947. We were playing golf together at the Hampshire Country Club and Max Steinberg said—while we were playing, during the course of the game, Max Steinberg said to me that some accountant is trying to see him in the worst way in reference to a tax matter in his squad.

Q. Did he tell you the name of the tax matter?

A. No, he did not. We kept playing and I kept needling him until I finally got the name out of him.

[fol. 209] Q. Did he indicate to you the nature of the case in any respect?

A. He indicated to me that it was a serious off-the-record sales case.

Q. Now, following this conversation——

The Court: You say you finally got it out of him. What did you get out of him?

The Witness: I finally got the name Pattullo Modes.

Q. Following this conversation on the golf course what if anything did you do about Pattullo Modes?

A. I spoke to Mr. Schopick and Mr. Davis and asked them if they could get a contact to the Pattullo Modes taxpayers. They came back and reported No.

Q. Well, did you do anything else about it?

A. Yes. I spoke to my brother-in-law, Mr. Herman Deutsch, who was in the dress business and asked him if he could get me a contact with the principals of Pattullo Modes.

Q. What happened as a result of that conversation.

A. On a Friday I received a call from my brother-in-law telling me that he was with the accountant of Pattullo Modes and could he come over. I said yes, come over.

Q. At the time you received this telephone call you were where?

A. At the office at 535 Fifth Avenue.

The Court: Schopick & Davis?

The Witness: The office of Schopick & Davis. I had space there.

Q. Following that conversation did Mr. Deutsch come over to your office?

A. Yes. Mr. Deutsch came over to the office with a Mr. Maurice Smith.

Q. And did you have a conversation with Mr. Maurice Smith?

A. Yes, I did.

Q. And who else, if anyone, was present at that time?

A. Mr. Deutsch introduced us and left. I had the conference with Maurice Smith alone.

[fol. 210] Q. In words or substance can you give us the conversation you had with Mr. Smith?

A. I said, "I understand a client of yours by the name of Pattullo Modes is in serious tax difficulties. I can be of some assistance to you. I also understand you have been trying to get to see a party by the name of Max Steinberg over at the Third District."

He asked me if I knew Mr. Steinberg, and I said yes.

Q. Did you tell him how well you knew him?

Mr. Perry: I object to that, your Honor.

Mr. O'Hara: I will withdraw the question.

Q. Did you say anything to Mr. Smith with respect to any relationship you had with Max Steinberg?

A. I said I was a good friend of Max Steinberg, and he asked for proof of that.

Q. What did you tell him with respect to that?

A. I said to him—I told him that Max Steinberg's daughter was being engaged Sunday and that in a short while I am going to the home of Max Steinberg to take liquor to the Hotel Statler, if he cared to, he could come along with me. He agreed to come with me.

Q. Did you go to see Max Steinberg together?

A. We both went to the home of Max Steinberg.

Q. Where was that?

A. On West End Avenue.

Q. Was that an apartment or house?

A. That is an apartment building, sir.

Q. Did you go upstairs in the apartment?

A. We did.

Q. Who was present there?

A. Mrs. Steinberg was present, Max Steinberg was present, some other people were present; I don't know who they were.

Q. Did there come a time when you left that apartment?

A. Yes, shortly thereafter.

Q. Who left the apartment?

A. Mr. Steinberg, Mr. Smith and myself. We took the liquor down in the car.

Q. We took the liquor down in the car? You went down to your car, is that right?

A. Yes, sir.

[fol. 211] Q. And who got into the car?

A. Mr. Smith, Mr. Steinberg and myself.

Q. At that time was there any conversation with respect to the Pattullo Modes cases?

A. We drove a while before there was some conversation about the Pattullo Modes case.

Q. Well, there did come a time when you were in the car when there was some discussion about the Pattullo Modes case? Is that right?

A. That is right.

Q. What was that discussion?

A. I said to Max Steinberg, "This is Maurice Smith, an old friend of mine. He is accountant for Pattullo Modes."

Q. What, if anything, did Steinberg say?

A. Max Steinberg said, "If you are a friend of Milton's I will do everything I can to help you."

Q. Following the conversation where did you go?

Mr. Perry: Fix the time? He didn't fix the time yet.

The Witness: This was on Friday, to the best of my recollection, the 5th of June 1947, sir.

Q. And you had liquor, you say?

A. Yes, sir, I had liquor in my car.

Q. And you were taking that where?

A. To the Statler Hotel for the engagement party of his daughter.

Q. Following this conversation did you all go to the hotel?

A. Yes, we all went to the hotel. We got somebody to help us take the liquor up. Mr. Smith went home, Mr.

Steinberg went home, and I proceeded out to Rockaway where I lived at that time.

Q. All right then, did there come a time when you met either Mrs. Segel or Mr. Marks or both?

A. I met both.

Q. When was that? The Monday after the engagement, I would say either the 7th or 9th of June.

Q. And where was that meeting?

A. At the office of Schopick & Davis, 535 Fifth Avenue.

Q. And who was present?

A. I remember Mrs. Segel, Mr. Smith and myself, and Mr. Davis. Possibly Morton Marks was there at that meeting.

[fol. 212] Q. In words or substance what was the conversation at the time of this meeting?

A. I told them about their tax case. I told them that if the firm of Schopick & Davis were retained, we can be of considerable help to them, and Smith told them that he had met Max Steinberg through me and we were friendly, and that was the conversation.

Q. Following the conversation was any decision reached?

A. Yes. We were told to come over to the offices of Pattullo Modes and that they would give us a retainer check.

Q. Did you go over there?

A. Yes, sir.

Q. Did you get the retainer check?

A. Yes, sir, we got a $7500 retainer check.

Q. You personally went over there, is that right?

A. With Mr. Davis.

Q. Have you ever met a revenue agent by the name of Scherm?

A. Yes, I did.

Q. Do you recall when you first met him?

A. Shortly after June of 1947.

Q. And do you recall where you first met him?

A. In the office of the Bureau of Internal Revenue at 341 Ninth Avenue.

Q. Will you please tell us the circumstances of that meeting?

A. I asked Max Steinberg for an introduction to Mr.

Scherm, and he told me to come over to the office, he would introduce me. I met Mr. Scherm in the hall of 341 Ninth Avenue and I was introduced to him.

Q. Now, did you ever have occasion to discuss with Mr. Steinberg the fact that Schopick & Davis had been retained by the Pattullo Modes people?

A. Sometime later, yes, sir.

Q. Approximately when would you say that was?

A. A month or a month and a half or two months later.

Q. Do you know where?

A. At the Hampshire Country Club.

Q. What was the occasion?

A. We were playing golf again and while we were playing I told Mr. Steinberg that we were retained in the Pattullo Modes case.

[fol. 213] Q. Was there any further conversation about the case?

A. Yes. Mr. Steinberg got very angry and told me that was no way of going about things, stealing a name and then trying to get a client, and he was very mad and left me on the golf course and went away.

Q. Is that all that was said on that occasion?

A. Before he left me on the golf course he said, "And I want to be taken care of in that matter."

The Court: He left you on the golf course? You mean you didn't finish the game or what?

The Witness: He just walked off, sir.

The Court: I mean, had you finished playing 18 holes?

The Witness: I don't think so.

Q. Now, following that time do you know if Mrs. Segel ever met Mr. Steinberg?

A. Yes, she did, at the Hampshire Country Club.

Q. Will you tell us how that came about?

A. Mrs. Segel was quite worried and there was some word going around that I wasn't in the same favor with Max Steinberg as I was before. So I decided to show her that we were, and I invited her husband to play golf with me. I introduced her husband to Max Steinberg, and it turned out to be a cordial hello. So I had her husband call and invite Mrs. Segel to come up and join us for lunch.

Q. Did you have lunch together there?

A. Yes, we did.

Mr. Perry: May we fix the time of that?

The Court: Can you fix the time of that approximately?

The Witness: No, I can't.

The Court: What year was it?

The Witness: I would say in 1947.

The Court: In the summer, fall——

The Witness: Summer; late summer of 1947.

[fol. 214] Q. Do you know Martin Schwaeber?

A. Yes, I do.

Q. Did you ever have occasion to meet Mr. Schwaeber in respect to the Pattullo Modes case?

A. Yes, sir.

Q. When was that?

A. About the early part of—the latter part of September or the early part of October, 1947.

Q. Can you tell us what the nature of those discussions was with Mr. Schwaeber?

A. Mr. Davis and I went over to see Mr. Schwaeber at the Belmont-Plaza Hotel to talk to him about being retained in the Pattullo Modes case.

Q. Well, did you have a conversation with him about that?

A. Yes.

Q. Was any decision reached?

A. Mr. Schwaeber said that he was going to have a partner by the name of Jim Saver shortly and he thought that would be the man to discuss the case with, whether he would handle the case.

Q. Do you know that Mr. Saver subsequently joined Mr. Schwaeber?

A. Yes, he did.

Q. Do you know whether or not Mr. Schwaeber and Mr. Saver were ever retained in connection with the Pattullo Modes case?

A. They were retained, sir.

The Court: By whom?

The Witness: By Schopick & Davis.

Q. Can you tell us to the best of your ability the approximate date of that?

Mr. Perry: Your Honor, can we fix the time of this?

The Court: He just asked him that.

Q. The question is—can you tell us the approximate date that Mr. Saver and Mr. Schwaeber were retained?

A. November of 1947.

Mr. Perry: Can I ask for the date of the conversation with Schwaeber?

[fol. 215] The Court: Well, you can cross examine.

Mr. Perry: I would like to get the date.

Mr. O'Hara: He already said it was the latter part of December.

The Court: All right, go on, Mr. O'Hara.

Q. Now, after the retention of the firm of Saver & Schwaeber did you ever have occasion to go any place with either of them in connection with this case?

A. I didn't hear that. Would you repeat that?

(Last question read.)

Q. Do you know when that was?

A. November of 1947.

Q. Was that after or before the retainer?

A. After they were retained, after we had spoken to them about the case.

Q. Had they actually been retained at the time you went to Washington, if you know?

A. Orally, I would say yes.

Q. Do you know where Mr. Saver was at that time?

A. Mr. Saver was in the Department of Justice in Washington, D. C.

The Court: Was he working there?

The Witness: Yes, sir.

The Court: You don't mean he was in the building? You mean he was actually working there?

The Witness: No, sir, he was an Assistant United States Attorney in the Department of Justice.

Q. Following November, 1947, what was the next occasion you had to see Mr. Saver?

A. I saw him at the Belmont Plaza Hotel again.

Q. With Mr. Schwaeber?

A. With Mr. Schwaeber.

Q. Was the Pattullo Modes case discussed on that occasion?

A. Yes, it was.

[fol. 216] Q. What was the nature of that discussion?

A. Mr. Davis and Mr. Schwaeber had a broad discussion about a voluntary disclosure.

The Court: That is rather general, a broad discussion about a voluntary disclosure. I think you ought to bring out what the substance of the discussion was.

Q. Can you tell us the discussion?

A. Mr. Schwaeber was explaining voluntary disclosure to Mr. Davis.

The Court: What did he say it was? You say he explained it. How did he explain it?

The Witness: He was telling him that you don't have to send a letter of voluntary disclosure to the Department, that you can just tell the agent while he was examining the case that there were certain off-the-record sales, and that is also considered a voluntary disclosure.

Q. Do you recall any more?

A. No, then it was strictly a conference between Mr. Davis and Mr. Schwaeber.

Q. Following this meeting, did you have occasion to see Mr. Saver?

Mr. Singer: Did he say Mr. Saver was present?

The Witness: Yes. Yes, there was a meeting in 1949.

Q. Did you see him again before 1949 in connection with the Pattullo Modes case?

A. Yes.

Q. When was that?

A. Sometime in 1948.

Q. When in 1948, to the best of your recollection?

A. I would say sometime in the early part of 1948.

Q. What was that occasion?

A. To discuss the Pattullo Modes case. Can I continue?

Q. Go ahead.

A. We were talking about what the possible outcome of the Pattullo Modes case would be and he couldn't see too much hope.

[fol. 217] The Court: Who couldn't?

The Witness: Mr. Schwaeber and Mr. Saver in the Pattullo Modes case.

Q. Did you ever go to the Ninth Avenue office of Internal Revenue with respect to the Pattullo Modes case?

A. Yes, I did.

Q. When was that?

A. Prior to this meeting that I have just discussed when Maurice Smith and Jim Saver went to 341 Ninth Avenue.

Q. Did you go with them?

A. I don't recall going with them, but I was waiting for them downstairs.

Q. Anyone waiting with you?

A. Mr. Davis.

Q. Had you been told as to whom they were going to see?

A. They were going to see Mr. Wheeler.

Q. When they left 341 Ninth Avenue, did you see them?

A. I did, sir.

Q. Did anyone tell you what had transpired at 341 Ninth Avenue that day?

A. They discussed voluntary disclosure with Mr. Wheeler and it was turned down.

The Court: When you say they discussed it, did they say what they did or anything like that?

The Witness: No. That is all that was told to me, that Mr. Saver and Mr. Smith discussed voluntary disclosure with Mr. Wheeler and it was turned down.

The Court: All right.

Q. At this time, the case was at 341 Ninth Avenue. Is that right?

A. That is correct.

Q. Did there come a time when the case was transferred from that office, if you know?

A. Yes. The case went down to 253 Broadway some time in 1948.

Q. What is at 253 Broadway?

A. That is the Intelligence Division.

Q. When in 1948, to the best of your recollection, did that happen?

A. About the middle of 1948.

[fol. 218] Q. You say that there was a conversation with

Mr. Saver and Mr. Schwaeber that you placed in between and after the visit to Ninth Avenue. Is that right?

A. That is correct.

Q. Following that conversation, what if anything occurred with respect to whether or not anyone else would be brought into the Pattullo Modes case?

A. Mr. Davis and I were discussing seeking other help in the Pattullo Modes case.

Q. Will you tell us in words or substance what those discussions were?

A. Mr. Davis then told me that he spoke to Mr. Max Halperin, who told him that he had an old friend in Washington, but whom he wasn't friendly with, but he thought an attorney by the name of Moe Polakoff was friendly with him.

Q. Did he tell you the name of the man?

A. I don't think on that occasion, sir.

Q. Go ahead, proceed.

A. Mr. Davis said he would get an appointment with Mr. Polakoff because he played gin with his brother.

Q. What if anything happened with respect to Mr. Polakoff?

A. Mr. Davis got the appointment with Mr. Polakoff, and we went over to see him at his office on Fifth Avenue.

Q. Can you give us the approximate date of this visit to Mr. Polakoff's office?

A. In 1948, somewhere around the middle or a little before the middle of 1948, April, around that time.

Q. After speaking with Mr. Polakoff, what if anything was done?

A. There was a trip arranged to Washington between Mr. Polakoff, Mr. Davis and myself.

Q. Did anyone tell you the purpose of the trip?

A. Mr. Davis told me that Mr. Polakoff was going down to Washington to talk to Mr. Grunewald.

Q. Mr. Henry Grunewald?

A. Yes, sir.

Q. Did you go to Washington?

A. We did, the next morning.

[fol. 219] Q. Mr. Polakoff, Mr. Davis and yourself?

A. That is correct.

Q. Where did you go when you got to Washington?

A. To the Washington Hotel.

Q. What happened when you got to the Washington Hotel?

A. Mr. Polakoff made a phone call from the desk and Mr. Davis and I remained in the lobby. I wandered around the lobby and possibly outside into the street, and when I came back, Mr. Davis and Mr. Polakoff were there and Mr. Davis told me that he saw a gentleman come down into the lobby with Mr. Polakoff.

Q. Did you see anyone with Mr. Polakoff other than Mr. Davis?

A. I did not.

Q. Did Mr. Polakoff report to you? Did he say anything to you after he came back?

A. Yes. Mr. Polakoff said he had seen Mr. Grunewald and Mr. Grunewald would let him know about the case.

Q. Then did you return to New York?

A. We returned to New York.

Q. Did you subsequently hear from Mr. Polakoff?

A. Yes. Mr. Davis received a phone call from Mr. Polakoff, and we went to the office of Mr. Polakoff.

Q. What did Mr. Polakoff say to you on that occasion?

A. Mr. Polakoff said he thought he could be of help to us, and that he would like us to bring the Pattullo people over and retain him.

Q. What if anything was said about that by either Mr. Davis or yourself?

A. Nothing was said. We said we would talk to him at a later date. We spoke to Mr. Polakoff at a later date and told him that we were not interested in bringing the clients over.

Q. Did there come a time when you heard of a case known as Gotham Beef?

A. Yes, sir.

Q. When was that?

A. In 1948.

Q. Whom did you hear it from?

A. Mr. Davis.

Q. Will you tell us what you heard from Mr. Davis with respect to Gotham Beef?

A. That Mr. Greenstein had introduced him to an ac- [fol. 220] countant—I think the name was Merdinger or Tobias—in reference to a tax case known as the Gotham Beef case.

Q. Did he tell you any more about the case?

A. That this was a tax case at 253 Broadway. It was being handled by a man by the name of Ronayne or something like that, and that there were serious threats of criminal prosecution.

Q. Did you discuss the Gotham Beef case with anyone else?

A. Yes, I discussed the Gotham Beef case with Mr. Max Halperin.

Q. What discussion did you have with Mr. Max Halperin about the Gotham Beef case?

A. Mr. Halperin decided to make a trip to Washington to try and re-establish his friendship with Mr. Grunewald.

Q. Do you know if Mr. Halperin went to Washington?

A. We both went to Washington, sir.

Q. You went with him?

A. Yes, sir.

Q. When was it that you made this trip?

A. Either May, June or July of 1948.

Q. Do you recall how you went?

A. We flew to Washington.

The Court: Was that after you had been down there with Mr. Pokaloff?

The witness: That is correct.

Q. Where did you go when you got to Washington?

A. To the Washington Hotel.

Q. Will you tell us, please, what happened from the time you got to the Washington Hotel?

A. We got to the Washington Hotel. Mr. Halperin went upstairs, went into the elevator of the Washington Hotel. I waited for him in the lobby of the Washington Hotel.

Q. Did there come a time when Mr. Halperin returned?

A. There came a time when Mr. Halperin returned.

Q. And did you have a conversation with him?

A. Yes, we had a conversation. Mr. Halperin said that he had re-established his friendship with Mr. Grunewald; [fol. 221] that he was very happy in re-establishing his friendship with Mr. Grunewald; that Mr. Halperin dis-

cussed the Gotham Beef case with Mr. Grunewald, and Mr. Grunewald made a phone call stating that this was Captain Henry, "Will you put a red flag or a red stop or a red light on the Gotham Beef case."

Q. Was Mr. Davis with you on this occasion?

A. No, sir, Mr. Davis was on vacation.

Q. Did you return to New York?

A. Yes, sir.

Q. What did you do next with respect to the Gotham Beef case, if anything?

A. I called Mr. Davis on the telephone where he was vacationing, and I told him that I had made a trip to Washington with Mr. Halperin; that Mr. Halperin had re-established his friendship with Mr. Grunewald, and that Mr. Halperin thought they could now get into the Gotham Beef case, and I said I would "Let Max talk to you."

Q. Max Halperin was present when you made this telephone call?

A. Yes, sir.

Q. Did Max Halperin talk with Mr. Davis?

A. Yes, sir.

Q. Did he talk about the Gotham Beef case?

A. Yes, sir.

Q. What did he tell him?

A. Same thing I told him.

Q. Following this time, did you have occasion to go to Washington again?

A. Yes. Shortly thereafter, I went to Washington again with Mr. Halperin.

Q. You say shortly thereafter. Can you tell us approximately what you mean by shortly thereafter?

A. A week, ten days, two weeks.

Q. Where did you go when you got to Washington?

A. Same Washington Hotel.

Q. What did you do when you got to the Washington Hotel?

A. I went upstairs with Mr. Halperin.

Q. Where did you go?

A. I went to a suite in the Washington Hotel with Mr. Halperin.

Q. Did you meet anyone there?

A. In the suite?

Q. Yes.

A. I went into an empty suite, sir.

[fol. 222] Q. Did Mr. Halperin stay with you?

A. No, sir.

Q. Where did you stay in this suite?

A. In the living room part of the suite.

Q. Did there come a time when Mr. Halperin returned?

A. Yes, sir.

Q. Was he alone when he returned?

A. No, sir.

Q. Who was with him, if you know?

A. There was Mr. Grunewald. There was a gentleman there with a black glove on his hand, and there was an air conditioner repairman.

Q. Were these people all there at the same time?

A. First there came in this gentleman with the black glove on his hand and the air conditioner repairman.

Q. What did they do, if anything?

A. They walked over to the window where there was an air conditioner and looked at it, and then Mr. Grunewald and Mr. Halperin came in.

Q. Was there any conversation at that time?

A. I was introduced to Mr. Grunewald.

Q. Was the Gotham Beef case discussed?

A. I was just introduced to Mr. Grunewald.

Q. What happened next?

A. Mr. Halperin and I left and returned to New York.

Q. Following the time you left the hotel, did you have any conversation with Mr. Halperin?

A. Yes. Mr. Halperin told me that Mr. Grunewald said he would look into the Pattullo Modes case and see if he could be of any help.

Q. Is that the substance of the conversation, or was there more?

A. That was the substance of the conversation.

Q. Following your return to New York, did you have occasion to have further conversations with Mr. Halperin with respect to either the Gotham Beef case or the Pattullo Modes case?

A. The only conversations I had with Mr. Halperin pertaining to those matters was asking him what was happening.

Q. What if anything did Mr. Halperin tell you was happening?

A. Mr. Halperin said it looked like everything would be all right.

[fol. 223] Q. Do you know whether or not Mr. Halperin had been to Washington?

A. Mr. Halperin made trips to Washington in between.

Q. Did he tell you that he made trips to Washington?

A. Yes, sir.

Q. Did he tell you the purpose of his trips to Washington?

A. No, sir.

Q. Did he tell you whom he had seen in Washington?

A. No, sir. I didn't ask him, sir.

Q. Did there come a time when there was a discussion about money in connection with the Pattullo Modes case?

A. Yes, there did.

Q. Tell us how that conversation came about and what the conversation was.

A. Mr. Halperin reported to Mr. Davis and myself that it looked like everything would be all right in the Pattullo Modes case; that the fee desired by Mr. Grunewald would be $150,000; and we said we would take it up with the taxpayer.

Q. Was anything specified with respect to the $150,000?

A. That if there would be no criminal prosecution that the $150,000 was to be delivered to Mr. Grunewald in Washington.

Q. Was anything said as to the form of the $150,000?

A. In cash.

The Court: Who said that at this point?

The Witness: Mr. Halperin.

Q. Were you present when this was taken up with the Pattullo Modes principals?

A. Yes, I was.

Q. Will you give us in words or substance the conversation.

A. We told the Pattullo people that it would cost $150,000 in cash to somebody in Washington if there would be no criminal prosecution in that case. They said it was impossible, they didn't know how they could raise that kind of money. We came back and reported to Mr. Halperin.

Q. Was anything specified as to how this money was to be raised?

A. That it was to be raised in small bills and no record to be left.

[fol. 224] Q. Do you recall whether Halperin was present at these discussions?

A. With the taxpayer?

Q. With the taxpayer.

A. No, sir.

Q. Following the discussion with the taxpayer, did you have any further conversation with Mr. Halperin with respect to your conversation with the taxpayer?

A. Yes; Mr. Halperin said he was going to make another trip to Washington and see if he can bring the price down.

Q. Do you know if such a trip was made?

A. Yes, the trip was made.

Q. Who made it?

A. Mr. Halperin made the trip to Washington.

The Court: How do you know?

The Witness: He came back and reported that he had reduced the amount to $100,000 and wanted Mr. Davis to come to Washington to meet Mr. Grunewald for confirmation of that.

Q. Was another trip made to Washington, to your knowledge?

A. Yes, there was.

Q. Who went on that trip?

A. Mr. Halperin, Mr. Davis and myself.

Q. Where did you go?

A. To the Munsey Trust Building.

Q. Tell us what happened after you got to the Munsey Trust Building.

A. Mr. Davis and Mr. Halperin went to the Munsey Trust Building, into the Munsey Trust Building, to Mr. Grunewald's office. I went to the Statler Hotel and waited for Mr. Halperin and Mr. Davis in the lobby.

Q. Did Mr. Halperin and Mr. Davis subsequently join you there?

A. Yes; they joined me in the lobby after a while.

Q. Did you have a conversation about the Patullo Modes case at that time?

A. Yes; I asked Mr. Halperin and I asked Mr. Davis

what happened. Mr. Davis told me that he had met Mr. Grunewald and that he had confirmed the $100,000 to be paid, if there was no criminal prosecution, in cash. Also [fol. 225] that the money was to be held in escrow by Mr. Halperin.

Q. Will you tell us the approximate date of this trip.

A. The latter part of 1948.

Q. Will you tell us, if you can, the month?

A. About October of 1948.

Q. For how long would you say conversations had been going on with the principals of Pattullo Moles with respect to cash money?

A. Will you please repeat that question?

(Question read.)

The Witness: I would say from the time when the request was made for $150,000 up until this time.

Q. Covering how long a period we are talking about?

A. About two weeks, a month, something like that.

Q. From the request to the date of the trip in Washington that you and Mr. Davis and Halperin went on. Is that right?

A. Right.

Q. Did you then return to New York?

A. Yes, sir.

Q. What happened next, and give us your best recollection as to time of the next event?

A. The next thing I knew, Mr. Schopick had told me that Mr. Davis had gone down to 253 Broadway with the taxpayers.

Q. When was that?

A. January of 1949.

Q. It was in approximately October of 1948 that you returned to New York. Is that right?

A. Yes, sir.

Q. At the conference in Washington there was an agreed amount?

A. $100,000.

Q. What if anything was done with respect to that amount, if you know?

A. The taxpayers were told about the $100,000, and they brought the $100,000 over to the office of Schopick & Davis.

The Court: Did you see it?

Q. Were you present?
A. Yes, I was.
Q. Who brought it?
A. Morton Marks.
[fol. 226] Q. Do you recall what it was in?
A. In a red folder.
Q. Did you count it?
A. No, sir.
Q. What was done with it, if your know?
A. I didn't hear that.
Q. What was done with it, if you know.
A. It was given to Mr. Davis, and Mr. Davis gave it to Mr. Halperin.
Q. Do you recall ever having a conference with Halperin and Segel with respect to the Pattullo Modes case?
A. I don't recall having a conference between Halperin and Segel.
Q. Approximately how long after you returned from Washington on this last trip was it that Mr. Marks came with the $100,000 in cash?
A. I don't recall whether it was a week, whether it was two weeks, whether it was a month, but I would say shortly thereafter.
Q. Would you say it was within a month?
A. I would think it was within a month.
Q. Following that time, what is the next event with respect to the Pattullo Modes case that you recall?
A. I came into the office at 535 Fifth Avenue, and I was told by Mr. Schopick that Mr. Davis was at 253 Broadway with the taxpayers being told the good news.
Q. Did you see Mr. Davis after that date?
A. Yes, I did.
Q. Did he tell you anything in connection with the Pattullo Modes case?
A. Yes. He told me he was at 253 Broadway with Mr. Saver and the clients, and that they were told there would be no criminal prosecution.
Q. Who else was present at the time that Mr. Davis told you this?
A. Mr. Halperin.
Q. Was Mr. Schopick there?
A. Yes, sir.

Q. Anyone else?
A. I was there.
Q. Is that all?
A. Yes, sir.
Q. Did you have any further discussion with respect to the Pattullo Modes case at that time?
A. At that time, no, sir.
Q. Did you have any discussion with respect to the $100,000 in cash?
A. At a later date.
[fol. 227] Q. How long after that?
A. I would say a day or two at most.
Q. What was that discussion?
A. That the $100,000 would have to be taken to Washington; there was no criminal prosecution on the case; there was no recommendation for criminal prosecution, and that the $100,000 would have to be delivered to Washington.
Q. What further was said about it, if anything?
A. That we would meet at the bank and count the money.
Q. Did you meet at the bank?
A. Yes, sir.
The Court: Who is "we"?
The Witness: Mr. Schopick, Mr. Davis, Mr. Halperin and myself.
Q. What bank was this, do you know?
A. The Chemical Bank and Trust Company.
Q. How long after Mr. Davis had been down to 253 Broadway did you go to the bank?
A. A short time thereafter.
Q. Did you all go to the bank together?
A. Yes, sir.
Q. What did you do when you got to the bank?
A. We went to the lower level of the Chemical Bank and Trust Company.
Q. Go ahead.
A. At 46th Street and Madison Avenue. We got a room, and Mr. Halperin went out and brought his vault box in.
Q. Was the box opened?
A. The box was opened and the envelope taken out.
Q. Then what was done, if anything?
A. The money was counted.

Q. Who counted it?

A. We all counted the money.

Q. Did you all count all the money?

A. We all counted a pile of it, and then it was added.

Q. Then what was done with the money, if anything?

A. Put back into the red folder and taken to 535 Fifth Avenue.

[fol. 228] The Court: You say you counted it. How much was there?

The Witness: $100,000.

The Court: Even?

The Witness: Yes, sir.

Q. Who took it there?

A. All of us.

Q. When you got there, what was done?

A. The envelope containing the money was taken into Mr. Halperin's room and put on the table there.

Q. Do you have any recollection as to the time of day that this event transpired?

A. About 12 or 12:30, 1 o'clock, when we reached 535 Fifth Avenue.

Q. Then what did you do, if anything?

A. I left the office for a couple of hours.

Q. Did you go back to the office?

A. Yes, I came back to the office after a couple of hours.

Q. When you got back to the office, did you have a conversation with either Mr. Davis, Mr. Schopick or Mr. Halperin?

A. Yes, I did.

Q. With whom did you have the conversation?

A. Mr. Halperin asked Mr. Davis first if he wanted to go to Washington with him. He then asked Mr. Schopick, and he then asked me, and I said I would go with him, provided I could return that night.

Q. Then what if anything was done?

A. The money was packed into two briefcases.

Q. Whose briefcases?

A. One briefcase belonged to me and one briefcase belonged to Mr. Schopick.

Mr. O'Hara: I ask to have this marked for identification.

(Marked Government's Exhibit 30 for identification.)

Q. I show you Government's Exhibit 30 for identification and ask you if you can tell me what that is (handing).

[fol. 229] A. This is my briefcase, the briefcase that part of the $100,000 was taken to Washington in.

Mr. O'Hara: I offer it in evidence.

The Court: Any necessity for putting a briefcase in evidence. It has been identified as the briefcase and I see no reason for cluttering up the record with a briefcase, unless there is some dispute about it.

Mr. Aranow: If there is anything in it, we wouldn't object.

The Court: It is empty. It is marked for identification but not received in evidence.

Q. Mr. Hoffman, did you agree, together with Halperin, to go to Washington?

A. I did.

Q. After the money was put in these two briefcases, what was done?

A. We left the office and took a cab in front of 535 Fifth Avenue to the Pennsylvania Station.

Q. Did you get a train there?

A. Yes, we got the Congressional Limited to Washington, D. C.

Q. Who had the briefcase?

A. I had one briefcase and Mr. Halperin had another.

Q. Did you have any conversation on the train about the contents of the briefcases or the trip or anything connected with it?

A. Yes. Mr. Halperin told me he was meeting Mr. Grunewald at the Union Station in Washington, D. C.

Q. What happened when the train arrived in Washington?

A. A few minutes before the train arrived in Washington, D. C., Mr. Halperin said that I should give him my bag and return to New York after we arrived in Washington. The train pulled into Washington, and I handed Mr. Halperin my bag.

The Court: Then what did you do? Were you still on the train?

The Witness: No, sir, I went off the train with Mr. Halperin.

[fol. 230] The Court: Where did you hand him the bag?

The Witness: Just a second before the train stopped in Washington, D. C.

The Court: So he was carrying both bags?

The Witness: Yes, at that time he had both bags.

Q. Where did Mr. Halperin go, if you know?

A. I walked with Mr. Halperin up the long platform of the Union Station, passed a high gate to the first waiting section of the Union Station. About 20 feet or 15 feet from the gate, Mr. Halperin met a gentleman.

Q. Whom did he meet? Do you know?

A. Yes, sir, he met Mr. Grunewald (indicating).

Q. Do you see Mr. Grunewald in this courtroom?

A. Yes, that is Mr. Grunewald (indicating).

Mr. O'Hara: May the record please note that the witness has identified the defendant Henry Grunewald.

The Court: Yes.

Q. That is the man you met at Union Station on that day?

A. Yes, sir.

Q. What transpired, if anything, at the time of this meeting?

A. Mr. Halperin again introduced me to Mr. Grunewald —"Mr. Grunewald, Mr. Hoffman"—and I said, "Max, will you ask him about the tickets for the inaugural parade?"

Max Halperin said, "You ask him," and I asked him. Mr. Grunewald stuck his hand in his pocket, pulled out some tickets, looked at them and said, "I'll send the tickets back with Mr. Halperin."

Q. What happened next?

A. I proceeded towards the end of the station to make a phone call home. Mr. Halperin and Mr. Grunewald went away.

The Court: What month was this?

The Witness: January of 1949.

[fol. 231] Q. Did you return to New York?

A. Yes, sir.

Q. Did Mr. Halperin subsequently return to New York?

A. Yes, sir.

Q. After his return to New York, did you have occasion to have any conversation with Mr. Halperin?

A. Yes, Mr. Halperin said——

Mr. Singer: Did you say they returned together?

Mr. O'Hara: No, sir.

Q. Did you return to New York alone?

A. Yes, sir.

The Court: You returned that night?

The Witness: Yes, sir.

The Court: What time did you get to Washington?

The Witness: I would say about 7:30 or thereabouts.

The Court: You took the Congressional. That is about right. When did you come back?

The Witness: Late that night. I think I flew back.

The Court: You didn't catch a train?

The Witness: No, sir, I think I flew back.

The Court: Where did you go in between the railroad station and the airport?

The Witness: I went from the station—I went in the station to the phone booth. I called my home, and then went out, took a cab to the airport.

Q. You came right back that same night?

A. That same night.

Q. When was it you saw Mr. Halperin, if you know?

A. A day or two later.

Q. Did you have a conversation with him about the Pattullo Modes case?

A. Yes.

Q. What was the conversation?

A. Mr. Halperin said that he and Mr. Grunewald counted the money, and there was a shortage.

[fol. 232] Q. Did he ask you to make it good?

A. I don't recall being asked to make it good.

Q. How much was the shortage?

A. A very small amount. I also received the two tickets.

Q. When he came back?

A. Yes, sir.

Q. Max Halperin brought the tickets back with him?

A. Yes, sir.

Q. When was this in January, to the best of your recollection?

A. I would say it was between the 10th.

Q. I show you Government's Exhibit 31 for identification and ask you if you can tell me what they are?

A. These are the stubs of the inaugural parade, the two tickets I received from Mr. Halperin through Mr. Grunewald.

Q. Do those tickets refresh your recollection as to the date of the inauguration?

A. January 20, 1949.

Q. And I take it that your trip preceded January 20th?

A. My trip was prior to January 20, 1949.

Q. And your trip was after the visit of Mr. Saver and Mr. Davis to 253 Broadway?

A. That is correct.

The Court: Did you go down to the inaugural parade?

The Witness: I did, sir.

The Court: You used the tickets?

The Witness: Yes, sir.

Q. Was Max Halperin down there?

A. Yes.

Q. Where did you stay when you were down there?

A. The Statler Hotel.

Q. Do you know where Max Halperin stayed?

A. Statler Hotel.

Q. Did you have any conversation with Max Halperin about Henry Grunewald when you were in Washington on that occasion?

Mr. Singer: The inaugural parade?

Mr. O'Hara: Yes.

The Witness: Yes, sir.

[fol. 233] Q. What was that conversation?

A. Well, I was in the grandstand at the inaugural parade. Mr. Halperin was at a party at Mr. Grunewald's suite.

Q. Did he tell you that?

A. Yes, sir.

Q. Now, following the date of the inauguration, January 20th, did you have occasion to see Mr. Saver or Schwaeber again?

A. Yes, sir.

Q. When was that?

A. The latter part of January 1949 or February 1949.

Q. Where did you see them?

A. In the office of Schwaeber & Saver.

Q. Whom did you see?

A. Martin Schwaeber and I think Mr. Saver.

Q. And who else was there?

A. Mr. Davis and myself.

Q. Did you have a conversation on that occasion with respect to the Pattullo Modes case?

A. Yes.

Q. And what was the conversation?

A. The conversation was in reference to the fee that Schwaeber & Saver were to receive in the Pattullo Modes case.

Q. What was said on that occasion?

A. At first Mr. Schwaeber wanted $25,000, and then after arguing and haggling it was brought down to $20,000. He wanted this money in cash.

Q. What did they say to you with respect to the cash that was requested?

A. They wanted the fee in cash. They felt that they were responsible for bringing the end of this case—bringing the result, rather, in this case and they wanted their fee.

Q. And what if anything did either you or Mr. Davis say?

A. We argued with them——

Q. (Continuing) With respect to that statement?

A. We argued with them to take the fee in checks and they insisted, and Mr. Schwaeber insisted that he wanted it in cash.

Q. Did either you or Mr. Davis deny that they had been responsible for the result in the case?

A. We did not.

[fol. 234] Q. Following this conversation was there a conversation with the principals of Pattullo Modes, to your knowledge?

A. I don't recall that conversation.

Q. You don't recall being present?

A. I don't recall being present at a conversation.

Q. Did Mr. Davis ever tell you he had such conversations?

A. Yes.

Q. Did he tell you what they were?

A. He told me he spoke to Mr. Marks in reference to the Schwaeber fee and Mr. Marks kicked why he couldn't pay the fee by check and then finally agreed to pay it by cash.

Q. Did you subsequently see Mr. Saver or Mr. Schwaeber?

A. Yes, I did.

Q. Approximately how long after your visit to their office was this?

A. I would say about a week later.

Q. Will you please tell us the circumstances when you met Mr. Schwaeber again, or was it Saver?

A. Mr. Schwaeber.

Q. Schwaeber.

A. I came into the office and Mr. Davis said, "Where were you? I am in a rush to leave. Mr. Schwaeber will be here in a minute. Give him this." And with that he ran out.

Q. What was "this"?

A. A box wrapped in brown paper with a cord around it.

Q. Did Mr. Davis tell you what the box contained?

A. Yes. Mr. Davis told me that Mr. Marks had brought that over to the office; it was Mr. Schwaeber's fee that he wanted.

Q. What happened next?

A. A few minutes later Mr. Schwaeber came into the office. I said, "Mr. Schwaeber, Mr. Davis left this for you." He took it— "Mr. Davis left this money for you." He took it and put it under his arm and walked out. As he was walking out, he had just walked out of the office, Mr. Schopick came in and almost bumped into Mr. Schwaeber as they—as he was coming in and he was going out.

[fol. 235] Q. Mr. Schwaeber took the paper package with him, is that right?

A. Yes, sir.

Mr. O'Hara: Your Honor, I am coming now to something which will take a little time.

(Discussion between Court and counsel.)

The Court: Well, we will adjourn then until 10:30 tomorrow morning.

(Adjourned to February 24, 1955, at 10:30 a. m.)

New York, February 24, 1955,
10:30 o'clock a. m.

Trial resumed.

MILTON HOFFMAN resumed the stand.

Direct examination.

Continued by Mr. O'Hara:

Q. Mr. Hoffman, yesterday you told us that there came a time that the Pattullo Modes case went down to the Intelligence Unit at 253 Broadway, is that right?

A. Yes.

Q. You also told us that there came a time that there was a conference with Mr. Baradell, is that right?

A. Yes, sir.

The Court: Mr. Baradell?

The Witness: Yes.

Q. Mr. Hoffman, you were not present at this conference with Mr. Baradell?

A. No.

Q. I believe you testified Mr. Davis reported to you what happened, is that right?

A. Yes, sir.

Q. Now, between the time that the case went to 253 Broadway and this conference with Mr. Baradell did you have occasion to speak to Max Steinberg with respect to the Pattullo Modes case?

A. Will you please repeat that?

(Last question read.)

The Witness: Yes, I did.

[fol. 236] Q. Can you tell us approximately when that was?

A. I can't give you the exact date, but I would think it was about 1948.

Q. Do you remember the occasion?

A. Yes, sir.

Q. What was the occasion?

A. It was a charity affair.

Q. A dinner?

A. Yes, sir.

Q. And you saw Max Steinberg at that dinner?

A. Yes, sir.

Q. Now, what if any discussion did you have with Max Steinberg on that occasion in so far as it relates to the Pattullo Modes tax case?

A. We were having a cocktail. Max Steinberg said, "What is happening to your, to the Pattullo Modes case?" And I said to him, "Don't worry. I hope everything will be all right, Max, and you will be taken care of."

Q. Did you have any occasion to speak to him again during this interval up to the time of the conference in Mr. Baradell's office?

A. I don't recall any other.

Q. Following the conference that was had in Baradell's office did you have occasion to see Max Steinberg again?

A. Yes, sir.

Q. Can you tell us approximately when that was?

A. Either the day, the same day of the conference with Mr. Baradell, or a day or two after.

Q. Can you tell us the circumstances?

A. I called Mr. Steinberg on the telephone and I said I would like to see him. I made an appointment to meet him at the end of the day at 341 Ninth Avenue. I drove to 341 Ninth Avenue with my car and picked up Max Steinberg.

Q. Was there anyone——

A. I was in the car with——

Q. Excuse me. Was there anyone with you in the car?

A. Yes. Irving Davis was in the car with me. We picked up Max Steinberg and drove to his home on West End Avenue.

Q. Did you go in his house?

A. Yes. We went up to his apartment.

[fol. 237] Q. Did you have any conversation with Max Steinberg at that time either in the car or in the apartment with respect to the Pattullo Modes case?

A. In the apartment.

Q. And what was that conversation in words or substance, please?

A. I said, "Max, no doubt that you know that there is no criminal prosecution in the Pattullo case. What is the score, Max?"

Q. What was Mr. Steinberg's reply?

A. "Don't discuss it with me. Take it up with the Agent Scherm."

I then——

Q. Go ahead.

A. I then asked Max Steinberg if he would go to dinner with me and he said no, and we left.

Q. Subsequent to this conversation did you have occasion to see Agent Scherm?

A. I saw Agent Scherm after that in the office of Schopick & Davis.

Q. Can you tell us approximately how long after it was that you saw Agent Scherm?

A. I would say it was shortly thereafter.

Q. Now, will you please relate the circumstances of your meeting Agent Scherm on that occasion?

A. Mr. Davis was talking to Mr. Scherm, and he came out and he said, "You better come in. He is asking for a lot of money."

Q. Did you go in?

A. I went inside and Davis said to me, "He is asking for $50,000."

The Court: Now, was Scherm in the room when that was said, or were you just talking to Davis?

The Witness: No. I went into the room. First I was outside. Mr. Davis asked me to come into room, Mr. Scherm was there.

The Court: All right. And he heard that statement? He heard Mr. Davis say that?

The Witness: Yes.

Q. Did you then have a conversation with Agent Scherm?

A. I said, "$50,000 for what?"

[fol. 238] Q. And what did Agent Scherm reply?

A. He said, "I will get it."

I said, "In a pig's neck you will. What did you do for it?"

He said, "It is not for me alone. It is for Steinberg, too."

And I walked out.

Q. Did the conversation continue with Scherm and Davis?

A. I walked out. They were in the room.

Q. You saw Scherm leave the office?

A. I don't recall seeing him leave the office.

Q. Did you have occasion to see Scherm again?

A. Yes, I did.

Q. After Scherm left, did you have any conversation with Davis?

A. I did.

Q. What was that conversation?

A. Davis said that the amount was brought down to $40,000.

Mr. Gottesman: If your Honor pleases, I assume that all this testimony is subject to connection.

The Court: Subject to connection, yes.

Mr. O'Hara: I would say this is pretty well connected to Agent Scherm.

Mr. Perry: In line with the Gillette decision which I gave your Honor, I ask that the evidence not be received against Steinberg. If the Court chooses to receive it, I ask that the instruction in the Gillette case be given.

The Court: The jury will understand that the testimony of what one co-conspirator said is admissible against the other co-conspirator if the jury reaches the conclusion that they are co-conspirators. The mere fact that somebody says something about somebody else is not evidence. That is hearsay evidence, except in the case of a conspiracy, and there a statement of one co-conspirator in the course of the conspiracy is binding upon all of the co-conspirators. But in order that that may be so, the jury will have to [fol. 239] decide they were in fact co-conspirators.

When I say we are taking the evidence subject to connection, the jury will have to realize that in order that evidence of a statement made by one person concerning another person is binding on the second person, the jury will have to decide whether or not they were co-conspirators.

Mr. Perry: May I ask further in line with the Gillette decision that the question of whether or not there is in fact a conspiracy must be determined by evidence other than these purported hearsay statements.

The Court: That is correct.

Go ahead, Mr. O'Hara.

By Mr. O'Hara:

Q. After that, what if anything occurred with respect to the Pattullo Modes principals, if you know?

Mr. Gottesman: If your Honor pleases, may I respectfully request that Mr. O'Hara step to one side so that I can see the witness.

The Court: Yes.

Mr. O'Hara: I am sorry.

A. The next thing I recall there was Davis had told me that he had received the $40,000 from the Pattullo people.

Q. Mr. Hoffman, when I refer to the Pattullo Modes principals, you understand me to mean Marks, Cohen, Zipser and Segel?

A. Yes, I do.

Mr. Gottesman: May we have a time and place on that, Mr. O'Hara?

Q. Can you tell us approximately how long it was after the conversation with Agent Scherm that Mr. Davis told [fol. 240] you this?

A. I would say all this happened shortly after the no-prosecution decision.

Q. After Scherm was in the offices of Schopick & Davis, estimate for us as best you can in days or weeks or months the amount of time that elapsed before Davis told you that the Pattullo Modes principals had agreed to the $40,000?

Mr. Gottesman: Your Honor, may I have the answer that the witness gave in which he said what Davis told him read by the stenographer?

The Court: Let us get this date. I don't want to confuse it. The time has been asked of him. We will get that, and then we will read the other answer back.

A. I would say shortly thereafter, when I saw Scherm in the offices of Schopick & Davis. I would say a week, maybe a little less, maybe a little more.

Mr. Gottesman: Your Honor, now may I have that previous answer read?

(The reporter read back the following:

"Q. After that, what if anything occurred with respect to the Pattullo Modes principals, if you know?

"A. The next thing I recall there was Davis had told me that he had received the $40,000 from the Pattullo people.")

Mr. Gottesman: I now move to strike out the next question after that in that Mr. O'Hara has stated something which is not a fact and was not testified to by the witness. Now, Mr. O'Hara's next question says in substance, "When did they say they agreed to it?" and I therefore——

The Court: I think you are right on that. That put in something which was not in evidence, Mr. O'Hara.

Mr. O'Hara: I realize that.

[fol. 241] The Court: We will strike that question out and just ask him when it was that he was advised that Mr. Davis said he had received the money.

Q. Mr. Hoffman, you remember my previous question in which you gave an answer as to time. I now ask you: Between the time that Scherm was in your office and the time that Mr. Davis told you that the Pattullo Modes principals had given him $40,000 in cash, how long a time elapsed?

A. I would say about a week, a little less, a little more.

Q. Did Mr. Davis tell you anything else about this that you recall?

A. That he expected Mr. Scherm shortly.

Q. Did you see Agent Scherm?

A. Yes, I did.

Q. Was that the same day that you had the conversation with Mr. Davis?

A. Yes.

Q. Where did you see him?

A. The office of Schopick & Davis.

Q. Tell us, please, the circumstances under which you saw him.

A. Mr. Scherm came into the office of Schopick & Davis. I walked out. I walked down the corridor, the outside corridor of the office, to see if anybody else was in the office.

I walked down towards the elevator. As I got towards the elevator, Mr. Schopick was coming off the elevator. I walked back with Mr. Schopick, up the long hall, to the office of Schopick & Davis and as we reached there, Mr. Scherm was walking out.

Q. Did you then go back into the office?

A. Yes, I did.

Q. Did you have any conversation with Mr. Davis upon your return inside the office?

A. Mr. Davis had told me that Mr. Scherm had picked up the envelope and left.

Q. At the time that this occurred, putting it now in sequence of years, can you give us the approximate month and year of this event?

A. I would say this event occurred about February of 1949.

Q. Do you know what the status of the Pattullo Modes tax matter was at that time?

A. It was decided at 253 Broadway that there would be no criminal prosecution.

[fol. 242] Q. Did that complete the matter? Was there anything else that was going on?

A. Yes, then there was the matter of settling the taxes, the civil taxes.

Q. Who, to your knowledge, on the part of the Government was engaged in that respect?

A. Mr. Clayton and Mr. Scherm.

Q. Did there come a time when the law firm of Schopick & Davis broke up?

A. Yes, there did.

Q. Can you tell us approximately when that was?

A. Sometime in 1951.

Q. After the break-up, where did the various people go and who went with whom?

A. I went with Mr. Schopick. Mr. Davis remained at 535 Fifth Avenue.

Q. Did he stay there alone?

A. No, sir.

Q. Who else was at 535 Fifth Avenue?

A. Mr. Halperin, and a room was rented.

Q. Did there come a time when it was brought to your

attention that a congressional committee was about to investigate tax matters?

A. Yes, sir.

Q. Do you recall who told you that?

A. Yes, I went over to the office of Schopick & Davis, the old office of Schopick & Davis, and Mr. Schopick was there, Mr. Davis was there, Mr. Halperin was there, and I came there.

Q. Did you have a conference there?

A. I think Mr. Schopick told me or Mr. Davis or Mr. Halperin, or one of them told me, that there is a congressional investigation and there is a possibility that they may look into the Pattullo case.

Q. Did you discuss this matter among yourselves?

A. At that point I was getting information from Mr. Schopick. Mr. Davis and I were not talking to each other.

Q. On that occasion, did you discuss it then with Mr. Schopick?

A. Yes.

Q. Did Mr. Schopick discuss it with Mr. Davis and Mr. Halperin or did he tell you that he did?

A. Yes.

Q. As a result of your conversations there, was any decision reached with respect to this prospective inves- [fol. 243] tigation?

A. They decided to call the Pattullo people over to the office.

Q. Do you know if they did?

A. They did call the Pattullo people to the office.

Q. Were you still there?

A. I was in the outer office.

Q. Did you participate in any conference with the Pattullo people?

A. I did not.

Q. Do you know who did?

A. Either Mr. Schopick, Davis and Halperin or Mr. Schopick and Davis.

Q. When in time did this event occur?

A. Sometime in 1951.

Q. Do you recall that Maurice Smith was subpoenaed before a Congressional Committee?

A. Yes, I was told.

Q. And do you know, or can you place that date?

A. I would say about sometime in 1951.

Q. Did you know of Mr. Smith's arrest?

A. I read it in the newspaper.

Q. Where were you then?

A. Florida.

Q. What if anything did you do after you read it in the paper?

A. I read it in the paper and shortly thereafter I came back to New York.

Q. And when you got back to New York did you see either Schopick or Davis or Halperin?

A. I saw Mr. Schopick.

Q. Did you have a conversation with him about the investigation?

A. I asked him what was happening and it was brushed off.

Q. Did you ever discuss with Mr. Smith the $100,000 in cash?

A. No, sir.

Q. Did you ever discuss with Smith any of the cash?

A. No, sir.

Q. Now, did you see Max Steinberg in 1951?

A. Yes, sir.

[fol. 244] Q. And do you recall approximately when you saw him in 1951?

A. Towards the last days of December of 1951.

Q. Do you recall the circumstance under which you saw him?

A. Yes, sir.

Q. Will you please tell us what they were.

A. I had learned that Pearl Steinberg had lost her brother. I called that day to offer my condolences. She told me that her brother was cremated. She felt very badly about it, losing her brother. She also told me that they were moving to the Pennsylvania Hotel that day. I offered my services, if I could drive them to the Pennsylvania Hotel with their personal belongings. It was agreed. I drove them to the Pennsylvania Hotel with their personal belongings.

Q. Can you tell us the month and the year this occurred?
A. It was prior to New Year's Eve of December, 1951.
Q. Was it in the month of December?
A. Yes, sir.
The Court: December, 1951, or December——
Q. December, 1951?
A. Yes, sir.
Q. And in December, 1951, had you been subpoenaed at that time before any Congressional Committee?
A. I don't think so.
Q. Do you know whether or not the principals of Pattullo Modes had been?
A. I think they were.
Q. After offering your services to drive them, was it accepted?
A. Yes, sir.
Q. Tell us what happened next.
A. I drove them down to the Pennsylvania Hotel and then I got an invitation to dinner for my wife and myself for New Year's Eve.
Q. Did you accept it?
A. Yes, sir.
Q. And did you have dinner with Max Steinberg and his wife on New Year's Eve?
A. Yes, I did.
Q. Where?
A. In their suite at the Pennsylvania Hotel.
Q. Was anyone else present?
A. My wife and myself when we had dinner.

(Short recess.)

[fol. 245] By Mr. O'Hara:

Q. Now, there was no one else present at this dinner, is that right?
A. No, sir.
Q. You stayed there after dinner?
A. Yes, sir.
Q. Were there other people present after dinner?
A. Some other people came in after dinner.
Q. Was there any discussion of the Pattullo Modes case on that occasion?

A. No, sir.

Q. Was there any discussion of where Max Steinberg was going to reside on that occasion?

A. Yes, Max Steinberg was leaving for California the next day or the day after that.

Q. Did you have a conversation relative to his departure?

A. Yes, I did.

Q. What was that?

A. I asked Max Steinberg if there was anything we could do together on the Coast, that I was interested in business agent work for talent.

The Court: Motion picture talent, you mean, or theatrical talent?

The Witness: Yes.

Q. You mean actors and people like that?

A. Yes.

Q. Do you know if Max Steinberg went to California?

A. Yes.

Q. Did you see him off?

A. No.

Q. Did you see Max Steinberg after that?

A. Yes.

Q. When was that?

A. In February of 1952.

Q. Do you know when?

A. In February of 1952.

Q. Do you know when in February?

A. I don't know the exact date, Mr. O'Hara.

(Government's Exhibit 32 marked for identification.)

Q. I show you Government's Exhibit 32 for identification and ask you if that refreshes your recollection as to any date (handling).

A. February 13, 1952, I left New York for California. [fol. 246] Mr. MacMahon: Your Honor, I couldn't hear that answer.

The Witness: February 13, 1952, I left New York for California.

Q. Where did you go in California?

A. To the home of Max Steinberg.

Q. Did anyone meet you on your arrival in California?

A. Max and Pearl Steinberg.

Q. How long did you stay at their home?

A. Five or six days.

Q. You went there February 13, 1952. Is that right?

A. Yes, sir.

Q. At this time, do you know whether or not any of the Pattullo Modes principals had been subpoenaed by a grand jury?

A. I do not.

Q. When you were in California, did you discuss the Pattullo Modes case with Max Steinberg?

A. No, sir.

Q. Following that time, did you have occasion to see or speak to Max Steinberg again?

A. I saw Max Steinberg in 1954.

Q. Did you have occasion to speak with him prior to that?

Mr. Perry: May we fix that more particularly?

Mr. O'Hara: I said prior to that.

A. I may have called him on the phone.

Q. Do you recall calling him on the telephone?

A. I recall some phone call there.

Q. Do you recall what the phone call was about?

A. No, I don't.

Q. Do you recall whether the phone call was after you returned from California?

A. I would say after I returned.

Q. Were you subpoenaed before the Brooklyn Grand Jury?

A. I was.

Q. Was the phone call made before or after your subpoena, if you recall?

A. I would say after.

[fol. 247] Q. Did you discuss with Max Steinberg your subpoena before the grand jury?

A. I don't recall the conversation, sir. I don't think so.

Q. You say you saw him in 1954?

A. Yes, sir.

Q. Where did you see him?

A. In this building.

Q. Did you have any conversation with him?

A. In this building? No, sir.

Q. Between the time that you left him in California in 1952 and the time that you saw him in this building, you had not seen him in that interval?

A. No, sir.

Q. Did you see him after the time that you saw him in this building?

A. Yes, sir.

Q. Can you have approximately when in 1954 it was that you saw him in this building?

A. I can't give you the date in 1954 when I saw him in this building, but all I can tell you was that I was subpoenaed before a grand jury that Mr. Newcombe was conducting.

The Court: Was it in the spring or the fall?

The Witness: I just can't recall that date.

Q. Where did you see Mr. Steinberg in the building?

A. In the witness room.

Q. Were you waiting to go before the grand jury?

A. Yes, sir.

Q. Did you go before that grand jury?

A. I did.

Q. Did you answer the questions that were asked of you?

A. I pleaded my privileges.

Q. Following that, did you speak to or see Max Steinberg?

A. I saw Max Steinberg after that for a few minutes.

Q. Will you please tell us the circumstances under which you saw Max Steinberg after that?

A. I called Max Steinberg's daughter and I said, "I understand your father is in New York, and for old time's sake, I would like to have lunch with him. Will you ask him to call me?"

Q. What happened?

A. I got a call from Pearl Steinberg and I met them at 36th Street and Madison Avenue.

[fol. 248] Q. You say "them". Who is "them"?

A. Pearl and Max Steinberg.

Q. Do I understand you met them at some place or on the street corner?

A. On the street.

Q. Did you have a conversation with Max Steinberg on that occasion?

A. "Hello"—"How are you?" And he asked me one or two questions, and he was in a hurry to leave.

Q. What did he ask you?

A. He asked me about the payment of the moneys to the Statler Hotel and I said he returned that to me. He asked me if he knew Maurice Smith, and I didn't answer that. He then left and I had a drink with Pearl Steinberg.

Q. Did you speak to or see Max Steinberg after that?

A. I called him on the telephone, asked him to have lunch with me.

Q. Where did you call him?

A. The Gotham Hotel.

Q. How long afterwards?

A. A few days after that.

Q. Did you have lunch with him?

A. No. They were leaving for California, I think, the next day.

Q. Incidentally, do you see Mrs. Steinberg in the courtroom?

A. I do.

Q. Tell us where she is, please.

Mr. Perry: Just a moment. Mrs. Steinberg, will you stand, please?

(A woman stood up in the courtroom.)

The Witness: That is Mrs. Pearl Steinberg.

Q. And Max Steinberg?

A. Yes, sir, that is Max Steinberg (indicating).

Mr. O'Hara: Will the record please indicate that the witness has identified Max Steinberg and Mrs. Pearl Steinberg?

The Court: Yes.

[fol. 249] Q. In connection with Mr. Deutsch, do you recall whether or not there was any payment made to Mr. Deutsch?

A. There was.

Q. Can you tell us how that came about?

A. Mr. Maurice Smith was in the office one day and I said to him, "You ought to give Herman Deutsch a gift."

Q. I couldn't hear the last part of your answer.

A. Mr. Maurice Smith was in the office one day and I said to him, "You ought to give Herman Deutsch a gift."

Q. What did Mr. Smith say?

A. Yes, he would.

Q. Did he say how much it was going to be?

A. I don't recall whether Mr. Smith told me he was going to send him $500 or Mr. Deutsch told me he received $500.

Q. Do you know if subsequent to that time any inquiry was ever made in respect to the gift to Deutsch?

A. Yes, there was.

Q. Tell us about that, please, if you recall, and go right along and give us the events.

A. We were being checked—the books of Schopick & Davis and my personal records were being checked at the request of the King Committee. While they were checking Mr. Smith, they came across this check of $500 and wanted to know what it was for.

Q. How did you gain this information?

A. The revenue agents came over to Mr. Davis' office and asked him about it.

Q. Were you present when he was questioned about it?

A. No, sir.

Q. Following the visit of the Internal Revenue——

Mr. MacMahon: Your Honor, I am having difficulty hearing with Mr. Corbin's constant rattling of papers in the back.

The Witness: Your Honor, I have a sore throat.

The Court: Just speak up as loud as you can.

Mr. O'Hara: May I have my question read as far as I went?

(Question read.)

[fol. 250] Q. (Continuing)—Agents to the office of Mr. Davis, what if anything was done, if you know?

A. Mr. Schopick went over to see Mr. Smith to ask him what he said or what——

The Court: Were you there when he asked him?

The Witness: When he asked Mr. Smith?

The Court: Yes.

The Witness: No, I was not there.

Q. Did you have a conversation with Mr. Schopick?

A. Yes.

Q. Did Mr. Schopick tell you where he was going?

A. Yes, sir. He told me he was going to Mr. Smith's office.

Q. Did you have a conversation with Mr. Schopick when he returned from Smith's office?

A. Yes.

Q. What did he tell you?

A. Mr. Schopick told me that Mr. Smith told him that, he showed his records and showed he charged the $500 against the moneys he received in the Pattullo matter.

Q. Now, were you subpoenaed before the Brooklyn Grand Jury?

A. I was.

Q. On more than one occasion?

A. On numerous—well, I received one subpoena but I was requested to come back on numerous occasions.

Q. Were you represented by counsel at that time?

A. I was.

Q. And who was that counsel?

A. Maxwell Goldstein.

Q. Whom did he represent at that time?

A. Mr. Schopick, Davis, Mr. Halperin and myself.

Q. And did he go with you when you appeared in Brooklyn?

A. He did.

Q. Did the four of you confer with him with respect to this matter?

A. We did.

Q. Did there come a time when you met a Mr. Kostelanetz?

A. I never met Mr. Kostelanetz.

[fol. 251] Q. Did there come a time when you learned that he was in some way involved in the Pattullo Modes tax case or investigation?

A. Yes, sir.

Mr. Singer: Did you use the word "involved"?

The Court: Next question.

Q. And at that time was the grand jury investigation pending in Brooklyn?

A. Yes, sir.

Q. Now, at any time did you ever have any negotiations with anyone with respect to immunity?

A. Mr. O'Hara, I would like to go back a bit, if you don't mind, sir: I learned that Mr. Kostelanetz was representing the Pattullo people at that time.

Q. At the time of the grand jury investigation?

A. Yes, sir.

Q. Did there come a time when you learned that the Pattullo Modes people were to gain immunity?

A. Yes.

Q. Now, do you recall when you learned that?

A. At the beginning of the grand jury hearings.

Q. Do you recall the circumstances, where you were at the time you got that information?

A. I heard it probably at Mr. Goldstein's office. I may have heard it before we went up to the Federal Building in Brooklyn.

Q. Well, now, did there come a time when the matter of the Pattullo Modes taxpayers talking was discussed?

A. Yes.

Q. Amongst you and Davis or anyone else?

A. Amongst Davis, Schopick and myself.

Q. Was it discussed with Halperin?

A. Well, it was reported back to me. I mean, I didn't have the actual discussion with Mr. Davis, but it was reported back to me.

The Court: By whom?

The Witness: By Mr. Schopick.

Q. Did there come a time when there was a conference at Mr. Goldstein's office with respect to that matter?

[fol. 252] A. Yes, there were various conferences at Mr. Goldstein's office.

Q. In particular, did there come a time that there was a conference at Mr. Goldstein's office and a representative or representatives went to see the Pattullo Modes principals?

A. Yes.

Q. Now, referring to that conference, will you please tell us who was at the conference and what occurred?

Mr. Singer: I ask that the question be split in two parts. To the first I have no objection; to the second I have.

The Court: Well, who was at the conference?

The Witness: Mr. Davis, Mr. Schopick, Mr. Halperin and myself.

The Court: And approximately when was this?

The Witness: In 1952.

The Court: Now, the next question, Mr. O'Hara, was what?

Mr. O'Hara: What occurred?

Mr. Singer: I object to that on the ground that it is a violation of the privilege between a client and his attorney.

The Court: On whose behalf are you asserting that privilege?

Mr. Singer: Halperin, who was present.

Mr. O'Hara: Your Honor, I will withdraw the question.

Q. Following the conference what if anything was done, if you know?

Mr. Singer: I object to that.

The Court: Objection overruled.

Mr. Singer: I respectfully except.

A. Mr. Davis—may I answer?

The Court: Yes. What was done after the conference? Don't tell us what was said in the conference with the [fol. 253] lawyer, but you can tell us what you did after the conference.

Q. What was done after the conference?

A. Mr. Davis and Mr. Schopick went to see Mr. Morton Marks.

Q. Now, did Mr. Davis and Mr. Schopick report back to you?

A. Yes. Mr. Schopick told me what happened.

Q. And on that occasion who was present at that report?

A. Mr. Davis, Mr. Schopick, Mr. Halperin and myself.

Q. Anyone else?

A. Mr. Goldstein.

Q. He was present at the time of this report?

A. He may have been. I am not sure of that. I think he was.

Q. Following the time that Davis and Schopick reported back to you did you have any further conversations with

either Mr. Davis, Mr. Schopick or Mr. Halperin with respect to the Brooklyn Grand Jury?

A. I don't recall any further conferences with respect to the Brooklyn Grand Jury. We decided we were going to plead our privilege at the Brooklyn Grand Jury.

Q. You say "we." Who was "we," who decided?

A. We discussed it with our attorney; and after the discussion our attorney thought we should plead the constitutional privilege.

Q. I was asking you whether there were any discussions that took place not with the attorney with respect to that matter.

A. Yes, there was.

Q. I would like to know whom those discussions were with?

A. Mr. Davis told me that they went over to see Morton Marks and Morton Marks had told them that they had decided to tell their story before the Brooklyn Grand Jury.

Q. Now, when Schopick and Davis went to see Morton Marks where did you go?

A. I was either in Mr. Goldstein's office or waiting for them in front of Mr. Goldstein's building.

Q. Were you alone?

A. No, sir.

Q. Who was with you?

A. Mr. Halperin.

[fol. 254] Q. Now, at this time were you on speaking terms with Mr. Davis?

A. Just about.

Q. And you had not been speaking for a year, or how long was it?

A. I would say almost that.

Q. Did the firm of Schopick & Davis receive fees from Pattullo Modes?

A. Yes.

Q. Do you know how those fees were received?

A. By check.

Q. Did you share in any of those fees?

A. I did.

Q. Do you know how much your share was?

A. I would say approximately 40 per cent.

Q. Do you know the amount of those fees?

A. Somewhere in the vicinity of $100,000.

Q. So that you would say you received approximately $40,000 of that?

A. Somewhere in that vicinity.

Q. Now, insofar as the firm of Schwaeber & Saver are concerned, do you know of any amount paid to them other than the $20,000 in cash you mentioned?

A. I think there were one or two checks to them.

Q. And do you know how much they were?

A. I would think about—I think the checks were about $3500.

Q. And whose checks were they?

A. Checks of Schopick & Davis.

Q. Mr. Hoffman, did you ever meet a man by the name of Monroe Tobias?

A. I did.

Q. Do you recall the circumstances under which you met him?

A. Mr. Davis was going down to that office, to the office of Monroe Tobias and he asked me if I would come along with him for the ride.

Q. And do you know when that was?

A. I can't give you the exact date of that.

Q. Did you ever meet a man by the name of Louis Berman?

A. I didn't—possible; I don't recall.

Q. Now, I believe you testified yesterday that after the trip to Washington you called Mr. Davis in the country and said you could get in on the Gotham Beef case now, is that right?

A. That is correct.

[fol. 255] Q. Now, will you tell us what transpired with respect to the Gotham Beef case after that insofar as you know?

A. Schopick & Davis was retained.

Q. And do you recall what happened after they were retained?

A. I don't recall after they were retained.

Q. Were you here at that time?

A. I wasn't in New York at that time.

Q. Well, were you away all of the time?

A. I would say most of the time.

Q. Did you ever have occasion to discuss the Gotham Beef matter with Max Halperin after the conversation on the telephone that you have related with Mr. Davis?

A. I don't recall any discussion. I don't recall any.

Q. You don't recall any, is that right?

A. No.

Mr. O'Hara: That is all, your Honor.

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Cross examination.

By Mr. Corbin:

Q. Mr. Hoffman, did you personally ever hear Mr. Grunewald say anything which you regarded at the time as having any unlawful or wrongful or improper connotation?

Mr. MacMahon: Same objection, your Honor.

The Court: Oh, I will allow it. Go ahead, answer the question.

A. The only thing I can tell you is what I was told by Mr. Halperin——

The Court: You didn't hear Mr. Grunewald say anything that you attached that connotation to then?

The Witness: No.

The Court: Have you said everything that Mr. Grunewald said in your presence, so far as you know?

The Witness: Yes, sir.

[fol. 256] Q. Did you ever at any time see Mr. Grunewald do anything that you regarded as wrongful or improper in any respect?

The Court: Objection sustained.

Mr. Corbin: I respectfully except.

The Court: This witness is not the jury in this case. You can ask this witness for facts.

Mr. Corbin: I hope not, Judge.

That is all.

Cross examination.

By Mr. Singer:

Q. Mr. Hoffman, you were telling us yesterday about your educational qualifications. Do you remember that?

A. Yes, sir.

Q. Do you remember you were saying that you had studied accounting and taken courses in accounting for four or five years over at N. Y. U., I think it was?

A. Yes, sir.

Q. And you have had some considerable experience in the accounting field when you were working with the Internal Revenue Department, hadn't you?

A. Yes, sir.

Q. How long had you worked in the Internal Revenue Department?

A. About a year.

Q. When was that?

A. In 1943.

Q. During the time that you were working for the Internal Revenue, what office were you working in?

A. Third District Collector's Office.

Q. Where is that?

A. 110 East 45th Street.

Q. Was the Ninth Avenue office open in those days?

A. Yes, sir.

Q. But you never worked at the Ninth Avenue office?

A. No, sir.

Q. You say you worked for the Collector of Internal Revenue? You were a deputy collector?

A. That is right.

Q. You were not an Internal Revenue agent?

A. No, sir.

The Court: You were a deputy collector?

The Witness: Yes, sir.

[fol. 257] The Court: Appointed as such?

The Witness: Yes, sir.

Q. In other words, yours was a direct appointment. That was before the time of Civil Service?

A. Yes.

Q. It was a political appointment, was it not?

A. It was not a political appointment.

Q. You didn't take any examination?

A. No, sir.

Q. When had you taken these accounting courses, before you went to work for the Internal Revenue or after?

A. Before.

Q. When you were with the Collector, were you handling income tax matters, too?

A. No, sir.

Q. What kind of work were you doing?

A. Bankruptcy audits.

Q. But no income tax whatever?

A. It was the filing of delinquent tax returns prepared by the Bankruptcy Division.

. . . . . .

Q. When did you set yourself up as a tax consultant?

A. When I was with the firm of Schopick & Davis.

Q. Whose idea was it that you should set yourself up as a tax consultant?

A. Well, I thought I had a knowledge of taxes and I saw no harm in it.

Q. Let me see. When was this that you set yourself up as a tax consultant—in 1946, 1947, 1945?

A. 1947, 1948.

Q. There is a letter over here—I don't know when it was—in evidence. It has your name on it, on Schopick & Davis's stationery, and your name is printed on there as a tax consultant?

A. Yes, sir.

. . . . . .

Q. Well, did you prepare—you filed applications for prices for clients at the OPA office?

A. That is correct.

Q. Now, would your name appear on any of those documents?

A. I don't think so.

[fol. 258] Q. Now, when you say you came there in 1945 that is, with Schopick—at least with Davis, the firm of Schopick & Davis, the firm had already been formed?

A. Yes, sir.

Q. And the other two men, Schopick and Sherman had already left the OPA?

A. Yes, sir.

Q. And you never appeared before Sherman or Schopick in the OPA office while they were employed by the OPA, is that right?

A. I didn't hear that.

(Last question read.)

Q. Did you ever file an application for yourself or a client or on behalf of Davis in the OPA office while Sherman and Schopick were employed in the OPA office?

A. No, sir.

Q. Are you sure about that?

A. I can't recall ever filing an application before Sherman or Schopick. I stated——

Q. I didn't ask you that. I said did you file an application in the OPA office. You understand the difference, Mr. Hoffman.

The Court: What difference?

Mr. Singer: Between filing it with them personally or filing it in the office while they were working there, while Sherman and/or Schopick were working at the OPA.

A. I don't recall.

Q. Now, when the three of them got together, Sherman and Schopick and Davis, that is when you went to work with them?

A. Yes, sir.

Q. Now, I assume there was some kind of written arrangement which fixed your interest in this firm?

A. I think there was one.

Q. When you first started.

A. Yes.

Q. Now, it was a law firm, was it not?

A. Yes.

Q. And the law firm was Sherman, Schopick & Davis?

A. Schopick, Davis & Sherman.

[fol. 259] Q. And Sherman, good. And your name was not on the stationery to start with?

A. No, sir.

Q. Now, do you know where that written agreement is, the one that you first had when you went there in 1945?

A. Do I know where it is today?

Q. Yes.

A. I don't.

Q. Have you seen it in the last two or three years?

A. I have not.

Q. Can you remember what percentage of the income of that firm you were to get when it started back in 1945?

A. I think that I was to get 12½ per cent of the OPA work.

. . . . . .

Q. In 1948 or 1949 it would have increased to about 40 per cent?

A. Yes, sir.

Q. As a matter of fact, wasn't it exactly 42½ per cent?

A. It could be 42½ per cent.

Q. Is there any doubt about it in your mind that it was exactly 42½ per cent?

A. I would say about 42¼ per cent, Mr. Singer.

Q. How do you figure that out?

A. How did I figure that out? At that date I knew what I was getting. I knew Mr. Schopick got 5½ per cent or thereabouts. That is how I figured it.

Q. 5½ per cent Schopick got; 42¼ per cent you got. That would make 47¾. Is that right? You looked at me. Am I correct in my addition? Is that right? And then Davis would get 52¼. It doesn't seem right to you, does it?

A. No.

The Court: Figure it again. Mr. Singer asked how you got the 42¾ or ¼. Now, see if you can figure it again.

The Witness: 47¼ per cent.

The Court: How much?

The Witness: 47¼ per cent.

The Court: You got 47¼ per cent?

The Witness: Yes.

[fol. 260] The Court: You got 47¼ per cent?

The Witness: Yes.

Q. I see now. Schopick got 5½ per cent and the balance

was split between you and Davis. Isn't that it? Isn't that the way it works out?

A. No, sir.

Q. All right, 47¼ and 47¼ is 94½.

A. I answered your question, sir. I said no, sir.

Q. All right. Schopick was still getting 5¼, wasn't he?

A. That is correct, but I answered your question, sir. I said no, sir.

Q. You mean I was wrong in my way of putting it?

A. Yes, sir.

Q. But you got 47¼ per cent?

A. Yes, sir.

Q. How much did Davis get?

A. 47¼ per cent.

Q. And Schopick got 5½ per cent?

A. I insisted upon the same amount as Irving Davis got. That is how it came about.

* * * * * * *

Q. When you took a job as Internal Revenue agent or as a deputy collector, you remember you took an oath to support and defend the Constitution of the United States? Do you remember that?

A. Yes.

Q. You remember also that when you got your card in the Treasury Department—or did you get a card to represent people in the Treasury Department?

A. No, sir.

Q. You have never had one?

A. No, sir.

Q. Had you ever told anyone that you could do that?

The Court: Could do what?

Mr. Singer: Could represent people in the Treasury Department.

A. Mr. Singer——

Q. Won't you answer my question?

The Court: No, there is a question. Have you ever told anybody you could represent them before the Treasury Department?

[fol. 261] The Witness: No, sir.

Q. So that like, for example, this St. Louis case we are speaking of, you never told the people in the St. Louis case that you were able to represent them personally before the Treasury Department?

A. No, sir.

Q. And the same would be true with respect to the Julianna?

A. I don't recall being asked about that.

Q. When you were doing this OPA business, what would you have to do with the preparation of these price applications? Would you do the actual preparation of them?

A. No, sir.

Q. Would you do the work on books or records of the applicant to get the figures or whatever is required?

A. No, sir.

Q. All that you would do would be to carry the paper over from Davis & Schopick's office—pardon me, Schopick, Davis & Sherman, to give them their proper position and respect—all you would do would be to carry the paper over to the OPA office.

The Court: Is that right?

Q. Is that right?

A. No, sir, it is not right.

Q. Would you represent the client?

The Court: You say it is not right. Explain what is right. What did you do?

The Witness: The application was prepared by either Schopick or Sherman. It was explained to me. I had some knowledge of OPA work. I took the application over. I discussed it with the individual in charge of the division and filed it with them.

Mr. Singer: Yes——

The Court: I think we have about come to the luncheon recess. Do you want to ask another question right at this point?

Mr. Singer: I just wanted to ask one question.

[fol. 262] Q. But Sherman and Schopick, who had been employed over at the OPA, they didn't go over and do the explaining. Is that right?

A. Do you want a yes or no answer?

The Court: No, you can answer yes with exception or no with exception. Get the facts.

The Witness: There was a regulation known as PR 13, where people working at the OPA could not appear before it for a certain length of time.

The Court: So the answer is that Schopick and Sherman did not go over there?

The Witness: That is correct.

The Court: But they sent you over with these things?

The Witness: Yes.

Q. So that what happened was that Sherman and Schopick would not go over there and they sent you over to do indirectly what they couldn't do under the regulations directly. Isn't that right?

A. That is correct.

The Court: We will now adjourn for lunch and meet at 2 o'clock.

(Recess to 2:00 p. m.)

Afternoon Session

Milton Hoffman resumed the stand.

Cross examination continued.

By Mr. Singer:

Q. Now, Mr. Davis, who was partners with Mr. Sherman and Schopick: He knew of this arrangement whereby you were to go over to the OPA in cases for Sherman and Schopick, is that right?

A. Yes, he did.

Q. As a matter of fact, that was the setup which was agreed upon before you all went together in 1945? Isn't [fol. 263] that right? That was the way you should operate?

A. Yes, that was.

Q. Now, who went out, if anybody did, to get the cases in the OPA? Was it you?

A. We all did.

Q. Well now, what did you do? Did you have any kind of inside information in the OPA to know where some violation was going to be brought against some particular business firm?

A. No, sir.

Q. Well, did you go around and talk to various business men whom you knew and ask them for business before the OPA?

A. Some I was recommended to. Some were people that I knew and I went to.

Q. When you went to these people whom you knew you would tell them, would you not, that in your combination, or however you described it, there were two fellows, Sherman and Schopick, who used to be pretty influential people over at the OPA, isn't that right?

A. Yes, I did.

Q. In other words, can I sum the whole thing up and say you would go out and sell Schopick's and Sherman's alleged influence or connections over at the OPA?

A. Yes, I did.

Q. And Davis would do the same thing, too, as far as you know?

A. I can't talk for Mr. Davis.

Q. Well, you have been telling us here all morning and yesterday what Davis would report to you about what he did or what was said or done someplace when you weren't there. Now tell me, did you ever discuss with Davis or did he ever tell you that when he went out to try to get clients that he would do the same kind of selling job that you just said you did?

A. I would say he did.

* * * * * *

Q. However, that partnership broke up and there was left remaining Schopick and Davis?

A. Yes, sir.

Q. That was sometime around the middle of 1946?

A. Yes, I would say so.

Q. Almost coincidental with the end or the stopping of the OPA business?

A. Right.

[fol. 264] Q. Now, up to this time you had had no tax cases yet. You were all busy with OPA cases?

A. Yes, sir.

Q. Let me ask the question: Up to this time, am I cor-

rect in assuming that Mr. Davis had other law work, regular law matters?

A. Yes.

Q. The money that his law cases brought in went into the pot with Sherman and Schopick. Isn't that right?

A. Yes.

Q. When the division was made, you got 7½ per cent and they split the rest. Is that right?

A. No.

Q. You only got yours out of the OPA. Is that right?

A. Not 7½.

Q. 12½. I don't care about the percentage.

A. Yes, I would think that is the way it was.

Q. But you didn't get any share of the other law cases?

A. Not at that time.

Q. Did you get it later?

A. Yes.

Q. There did come a time later when you, not a lawyer, shared in the fees on other cases?

A. Yes.

Q. Have you ever been told that it is a crime to take such a share of law cases as a layman?

A. Yes.

Q. And you knew it when you were doing it?

A. I didn't know it at that time, but I know it now.

Q. Davis didn't tell it to you?

A. I don't recall being told at that time.

Q. Schopick didn't tell it to you?

A. I can't recall being told at that time.

Q. Incidentally, while we are on that subject, was there ever a time when Davis asked you for some kind of a writing by you to the effect that you were a lawyer admitted to practice law?

A. I don't recall ever being——

Q. Do you remember ever giving Davis a writing which in effect or substance stated that you were a lawyer admitted to the Bar in the State of New York?

A. No, sir.

Q. And, to the best of your recollection, there never was any request for such a writing?

A. To the best of my recollection, there was not, sir.

[fol. 265] Q. And, to the best of your recollection, there never was any discussion between Davis, Schopick and you back when this arrangement was made, where you were to share in the law fees, about the fact that you as a layman had no right to share in law fees?

A. I don't recall any discussion.

Q. What was this, a company or a law firm?

A. This was a law firm.

Q. A law firm where you, the layman, got 47¼ per cent or 47 some-odd per cent, a fractional percentage, and the lawyer, who was a partner in the firm, only got 5¼ per cent or 5½ per cent? Don't hold me to the fractions. What was this, a company of some kind, a corporation, or was it a law firm?

Mr. MacMahon: I object to the form of that question.

The Court: I think the witness has answered it was a law firm. What is the next question?

Q. Did the law firm file a partnership return?

A. I think they did. I am not sure of this, Mr. Singer.

Q. You said by this time you felt perfectly competent to hold yourself out as a tax consultant, am I correct?

A. Yes.

The Court: He has so testified.

Q. When that partnership return was filed, did your name appear on that return as one of the partners in the firm?

A. It did not.

Q. But you were a partner to the extent of 47 some fractional per cent of the income?

A. I was not a partner. I was associated with the firm, Mr. Singer, and that was my share of the income.

Q. And that is the position you are willing to take now, that you weren't a partner, you only got 47¼ per cent of the take. Is that it?

A. Yes.

[fol. 266] Q. When you went to the ballgame did you know that Steinberg was going to be there?

A. Yes, I did.

Q. Did you know that the man whom you were going to the ballgame with knew Steinberg?

A. He was in Steinberg's squad.

Q. So that you deliberately asked this man—what is his name, this man?

A. Auerbach.

Q. You deliberately asked Auerbach to take you to a ballgame so you could be introduced to Steinberg, isn't that right?

A. Yes. He told me his boss was going to be there and I said I would like to meet him.

. . . . . .

Q. Was Mr. Davis there with you when you had this talk with Mr. Smith?

A. He was not.

Q. Just you and Smith alone?

A. Yes, sir.

Q. Did you tell Mr. Smith in words or in substance that you had some kind of an in in the Treasury Department or Internal Revenue Department, and that you and your firm or your partners could handle this matter better than anybody in the world?

A. I said I was a friend of Max Steinberg's, and that the case was in his squad, and I found out about the case through Max Steinberg.

Q. Did you say to Mr. Smith that if he didn't retain you, his clients were sure to go to jail?

A. I don't recall saying that, Mr. Singer.

Q. Did you say to him that you had the influence to do better for his clients than any other lawyer in the City of New York? A. I said that——

Q. Did you say what I just asked you?

A. I don't recall that conversation.

Q. Did you say that you had made it your business to be friendly with a lot of people up on Ninth Avenue in the Revenue Office, and that you had connections which were unbeatable? Did you say that?

The Court: In words or substance.

[fol. 267] Q. (Continuing) In words or substance?

A. Yes, I did.

Q. Would I be correct in saying that you were doing the same kind of a selling job on Mr. Smith that you had done on the OPA clients you were looking to get?

A. Here was a situation where an accountant was trying to reach somebody whose client was in serious tax difficulties. I did do a selling job.

Q. And when you were selling, you didn't mind extending the actual truth a little bit, did you?

A. It could be not.

Q. In other words, you did pretend ability to do things which you really couldn't do?

A. That is correct.

Q. And you didn't care what you told the man as long as you could get the case. Isn't that right?

A. No, sir, it is not.

Q. You would only extend the truth a little bit, not much. Isn't that right?

A. I said in the Pattullo case I could be of terrific help because I knew Max Steinberg and the case was in his squad.

Q. But actually you didn't have any agreement with Max Steinberg to help you in this case when you were talking to Smith, did you?

A. No, I did not.

Q. But you pretended to Mr. Smith that you had influence with Steinberg and that Steinberg would help you. Isn't that right?

A. Yes, it is.

Q. You pretended to Steinberg that you were his friend, didn't you?

A. I did.

Q. And now you pretended to a stranger that your friend, Steinberg, would do something wrong for you. Isn't that right?

A. No, it is not.

Q. Put it your way, if you please.

Mr. O'Hara: Do we have a question?

The Court: What is the question?

Q. I said put it your way.

The Court: That isn't a question. What is the question you want him to put his way?

[fol. 268] Q. You said that was not right.

A. Right.

Q. Do you want to put it another way?

The Court: Put what another way? Ask the previous question or read the previous question.

(The reporter read back the following question:

"Q. And now you pretended to a stranger that your friend, Steinberg, would do something wrong for you. Isn't that right?

"A. No, it is not.")

The Court: Do you want to expand that answer?

The Witness: No.

Q. You were selling to Mr. Smith your friendship or acquaintance with Steinberg, weren't you?

A. Yes, I was.

Q. Without asking Steinberg' permission to do it. Isn't that right?

A. Yes, it is.

Q. Let me ask you at that point: According to your conscience, if you have one, was that a proper thing to do? Did you feel that you were doing the right thing?

A. No, I did not.

Q. You knew it was wrong, didn't you?

A. Yes, it was wrong.

Q. But you did it for money to get a case. Isn't that right?

A. I did it to get the case; yes, sir.

Q. And the fact that it was wrong didn't stop you from doing it, even though you knew it was wrong when you were doing it. Isn't that right?

A. That is correct, Mr. Singer.

. . . . . .

Q. Let us go back to Smith. Before Mrs. Segel and Marks were brought up to the office, you and Davis had a little talk with Smith about cutting him in for 20 per cent of your fee. Isn't that right?

A. Mr. Smith wanted to know—may I continue?

Q. Certainly.

A. Mr. Smith wanted to know if he could get part of the fee, and I think it was agreed upon 20 per cent.

[fol. 269] The Court: By whom.

The Witness: By Mr. Davis, Mr. Smith, and I think I was there.

. . . . . .

Q. So that this talk that is covered on pages 1716 and 1717 of the record, where there was this broad discussion about voluntary disclosure, was only between you, Schwaeber and Davis?

A. Yes, sir.

Q. Jim Saver wasn't there?

A. I don't think so; no, sir.

Q. When you were then talking that night about voluntary disclosure, was there anything said by you or Davis about whether you could use voluntary disclosure in the Pattullo case?

A. I don't recall it, sir.

Q. Had you had a discussion, you and Davis, which you were going to pump Schwaeber to get all that he knew about voluntary disclosure, and then to see later on whether you and he would use it?

A. There was no discussion, sir, about pumping Mr. Schwaeber about all he knew of voluntary disclosure. It was discussed there.

Q. Wasn't there a plan between you and Davis to bring the topic up for discussion because you intended to use that later in the very case, the Pattullo Modes case?

A. No, sir.

Q. The discussion on that subject just developed. Is that right?

A. Yes, sir.

Q. And you pursued it to the point, both of you, where it was brought up, and now you say Mr. Schwaeber explained that it wasn't just writing the letter at the start, but that you could even wait until the man had finished his audit and then say, "I got something to tell you that you don't know," and that is also voluntary disclosure?

A. That is correct.

Q. It was that night in November of 1947 when you and Davis first learned of that branch of the theory of voluntary disclosure?

A. Yes, sir.

Q. Was it within a few days after that, that you first broached Smith with the idea that he should go along with [fol. 270] this theory?

A. I can't answer that. I did not approach Smith.

Q. You have told me here everything that Davis reported to you. Am I correct in saying that Davis reported to you that he had approached Smith on this subject?

A. He told me he spoke to Smith.

Q. About voluntary disclosure?

A. Yes.

. . . . . .

Q. Let me see. Did you know in January, 1948, that voluntary disclosure was going to be discussed by Smith with Wheeler?

A. Yes, sir.

Q. Did you know from your discussions with Smith that there never had been a voluntary disclosure?

A. No, sir.

Q. Didn't Smith always claim that he never knew about the off-the-record sales to Lochmann's until after some agent told him about them? Isn't that right?

A. That is right.

Q. And that was after an audit had been completed. Isn't that right?

A. I can't answer that Yes or No.

Q. Then don't answer it. Now, you knew then, did you not, that if Smith didn't know about the off-the-record sales to Lochmann's until April of 1947, he couldn't have told it to any agent in January. You knew that, didn't you?

A. I did not.

Q. You never thought about it that way?

A. It was possible that Smith didn't think of it then.

Q. I see. It was possible that Smith didn't think of what?

A. That he had told the agent, when he told me the story about the off-the-record sales.

Q. But he couldn't have told the man, as you well knew, what he didn't know? He didn't know this fact he said until April, so he couldn't have told it to anybody in January. You know that, don't you?

A. No, I don't know that, Mr. Singer.

Q. Oh, I see. So that now you are trying to tell us that so far as this voluntary disclosure lie was concerned, you [fol. 271] didn't know about it at all until July or August, 1951, when Smith was arrested?

A. Yes, sir.

Q. And for two years or more, two and a half years——

A. I knew that there was an affidavit filed, yes.

Q. And you knew that that affidavit was false?

A. I did not know that affidavit was false at that time.

* * * * * * *

Q. As we then have it, you got $40,000 out of this case over a period from 1947 through 1950. Is that right?

A. Yes, sir.

Q. And you did no work at all as a tax consultant at any time on this particular case, am I right?

A. Mr. Davis handled that case——

Q. Excuse me. You will answer my question.

The Court: Did you do any work as a tax consultant, in your opinion?

The Witness: No, sir.

The Court: All right.

* * * * * * *

Q. You did not overhear any conversation between Mr. Polakoff and Mr. Grunewald, did you?

A. No, sir.

Q. You didn't overhear any conversation between Mr. Halperin and Mr. Grunewald about this Pattullo case?

A. Only what was reported to me.

Q. You answer my question——

The Court: Did you overhear any conversation between Mr. Grunewald and Mr. Halperin about this matter?

The Witness: No, sir.

Q. You didn't overhear any conversation between Mr. Saver and Mr. Smith about this matter?

A. No, sir.

Q. You didn't overhear nor were you present at any discussions between Mr. Wheeler and Mr. Saver or Mr. Smith?

A. No, sir.

[fol. 272] Q. All that you have told us then on these par-

ticular points or things or testimony you have given is what other people have reported to you. Is that right?

A. Yes, sir.

. . . . . .

Q. Mr. Hoffman, you have told people lies about things that you are supposed to have said to other people, haven't you, in your life?

A. Yes, sir.

. . . . . .

Q. Now, then, there came a time sometime later when Halperin talked to you and Davis about the Pattullo Modes case. Do you remember that? And that was a talk about a $150,000 fee. Do you remember that?

A. Yes, sir.

Q. As I now understand it, Mr. Halperin reported to you and Davis that it looked like everything would be all right in the Pattullo Modes case, that the fee desired would be $150,000, and that you said that you would take it up with the taxpayer, and that there would be no criminal prosecution? That is in words or substance?

A. Yes, sir.

Q. And that $150,000 was to be paid in cash?

A. Yes, sir.

Q. You say the word "fee" was used in connection with that?

A. Yes, sir.

Q. You were there when Halperin used the word "fee"?

A. Yes, sir.

Q. I am going to ask you directly, was the word "fix" used instead of "fee"?

A. No, sir.

Q. Was the word "bribe" used instead of "fee"?

A. No, sir.

Q. Was any other word used at this time? Was any other word used in connection with this $150,000 other than "fee"?

A. To get the result?

Q. That is right.

A. Of no criminal prosecution.

Q. Do you mind answering my question? You didn't answer my question. I asked you whether the word "fee" was used or any other word.

A. Yes, the word "fee" was used.

[fol. 273] Q. And no other word used to describe it? Fee, am I right?

A. That there was a fee of $150,000 wanted to secure the result of no criminal prosecution.

Q. No matter what it was to secure, was there any other word used to describe this money asked for other than f-e-e, fee?

A. No, sir.

* * * * * * *

Q. Now, when you talked to the taxpayers Marks and Segel, Halperin was not in the room, was he? About the $150,000?

A. No, sir.

Q. Whose idea was that if it was anybody's?

The Court: Whose idea was what?

Q. Not to have Halperin in the room when you talked to the taxpayers about the $150,000.

A. We went over to the taxpayers' place to talk to them.

Q. Did Halperin say he wanted to go along?

A. I don't recall him saying he wanted to go along.

Q. Did you and Davis decide that you ought not to take Halperin along?

A. No, sir.

The Court: I think at this point we will take our morning recess.

(Short recess.)

Q. Who was the one who suggested to the client that the money had to be in small bills and no record?

A. Mr. Davis.

* * * * * * *

Q. Incidentally, when we are speaking of money, Scher & Roder got a fee of about $40,000, didn't they?

A. I think so.

Q. Am I correct that your firm got about $16,000 as forwarding fees or approximately 40 per cent?

A. Yes, sir.

Q. Have you figured that in your $40,000 take in the Pattullo case?

A. No, sir.

[fol. 274] Q. So that actually, since you got about 47 per cent of the $16,000, let us say roughly about $7,500 more that you got. Isn't that right?

A. Yes, sir.

Q. So that when you said you got $40,000, you really got about $47,500?

A. Yes, sir.

. . . . . .

Q. Now, in so far as the fee in the Gotham Beef case, that is this fee of $60,000, or whatever they said it was, and $100,000 in the Pattullo case for the criminal prosecution—that was finished and done with, the work was done, and the whole situation was completed in so far as Mr. Halperin was concerned?

A. Yes, sir.

Q. Mr. Halperin had no duty with respect to any other phase of the Gotham Beef case after that time as far as you know, is that right?

A. Yes, sir.

Q. And he had no further duties with respect to the Pattullo Modes case after that time, as far as you know?

A. Yes, sir.

Q. And that is positive?

A. Yes, sir.

. . . . . .

Q. Now, then, there came a time, I think you testified yesterday, when in 1951 you and Davis broke up?

A. Yes, sir.

Q. Some falling out, I assume?

A. Yes, sir.

Q. Was it with regard to finances, money?

A. It was in regard to a business venture that went sour.

Q. Was it an argument over money?

A. No, sir.

Q. Some business venture you both went in went sour, is that right?

A. Yes, sir.

Q. That was that Bernstein deal?

A. No.

Q. Some other transaction?

A. Yes, sir.

Q. Who was in that transaction?

A. Mr. Davis, myself and his nephews.

Q. Mr. Davis's nephews?

A. Yes, sir.

* * * * * *

[Fol. 275] Q. You pleaded guilty to an indictment filed in this court sometime last June, did you not? Is that right?

A. Yes, sir.

Q. At the time you pleaded guilty, Mr. Schopick and Mr. Davis pleaded guilty?

A. Yes, sir.

Q. To the same first count of this indictment I have described?

A. Yes, sir.

Q. And that first count of the indictment charged you with a conspiracy of some kind. Is that right?

A. Yes, sir.

Q. I am not asking exactly what the count contained, but you know, do you not, that you pleaded guilty to such an offense?

A. Yes, sir.

Q. Prior to that indictment having been filed, there had been, as you well know, an indictment filed against Schopick and Davis for income tax violations. Is that right?

A. Yes, sir.

Q. And that income tax indictment involved $100,000 that Schopick and Davis had failed to declare for 1948. Is that right?

A. Yes, sir.

* * * * * *

Cross examination:

By Mr. Gottesman:

Q. Mr. Hoffman, did you ever meet Mr. Scherm socially?

A. No, sir.

Q. Did you know that Mr. Scherm stated that there was no voluntary disclosure in the Pattullo Modes case?

A. I learned of that, yes, sir.

Q. Did you handle the civil tax end of the Pattullo Modes case?

A. No, sir.

Q. Who handled that civil tax end?

A. Mr. Davis.

Q. Did there come a time when you learned that the Pattullo Modes had been assessed $240,000 in taxes?

A. Yes, sir.

Q. Did you also learn that included the maximum penalties which could be assessed?

A. Yes, sir.

[fol. 276] Q. Did there come a time when you learned that there were other attorneys retained by Pattullo Modes to cut down the tax because they thought it was excessive, the civil tax?

A. Yes, sir.

Q. Did you know that it was cut down to $160,000 by Scherm's superior?

A. I don't know what the amount was.

* * * * * *

HERMAN F. KUEHL, called as a witness in behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Heffron:

Q. Where do you reside, Mr. Kuehl?

A. 8701 Shore Road, Brooklyn, New York.

Q. By whom are you employed?

A. The Internal Revenue Service, Intelligence Division.

Q. Will you raise your voice, please?

A. Internal Service, Intelligence Division.

Q. In what capacity?

A. As Chief of the Review and Conference Staff.

Q. Were you employed by the Bureau of Internal Revenue during 1948?

A. Yes, I was.

Q. In what capacity?

A. As Assistant Special Adviser.

Q. Do you know Daniel Bolich?

A. Yes, I do.

Q. Do you see him in the courtroom?

A. Yes, I do.

Q. Will you point him out, please.

A. That is Mr. Bolich there (indicating).

Mr. Heffron: May the record indicate the witness has identified the Defendant Daniel Bolich?

The Court: Yes.

Q. Did a time come during your service with the Bureau of Internal Revenue when Daniel Bolich became your superior?

A. Yes.

[fol. 277] Q. When was that?

A. I think around January, 1946, shortly after the first of the year.

Q. What was your position at that time?

A. At that time I was a special agent.

Q. What did you become thereafter?

A. I became assistant special adviser around June of 1947.

Q. Was Daniel Bolich your superior at that time?

A. Yes, he was.

The Court: What was this special adviser?

The Witness: Well, it is a sort of a technical adviser position.

The Court: Technical adviser to whom?

The Witness: To the special agent in charge.

The Court: All right, thank you.

Q. For how long did Daniel Bolich remain your superior?

A. I believe from the first part of 1946 to around September, 1948.

Q. That was at 253 Broadway?

A. Yes.

Q. Did you ever hear of a case called the Gotham Beef case?

A. Yes, I did.

Q. When was that?

A. Around April 22, 1948, the Gotham Beef case was assigned to me by Mr. Baradell, my superior at that time.

Q. What was your position at that time?

A. Assistant special adviser.

Q. What did your duties consist of?

A. The duties consisted of reviewing cases, prosecution and non-prosecution cases, to see that the reports were properly prepared, to see that their recommendations conformed with Bureau policy and the evidence, and to hold conferences in the settlement of those cases.

Q. You were reviewing reports and recommendations by whom?

A. By the special agents of the Intelligence Division, New York office.

Q. Now, after the Gotham Beef case was assigned to you what steps did you take in processing it?

[fol. 278] A. Well, at a subsequent date I arranged for a conference with Ronayne who had powers of attorney at that time from the taxpayer, and I arranged a conference with him for July 22, 1948, and I think on July 21 Ronayne called me and asked to have that date postponed, which we did, and the date was arranged with him for August 3, 1948.

Q. Now, what happened after that?

A. Somewheres around July 29th or July 30th I had received a call from Mr. Bolich telling me that Davis was in his office in connection with the Gotham Beef case.

Q. Will you try to tell us just what Bolich said to you?

The Court: Wait a minute. Had you talked to Mr. Bolich on the telephone before?

The Witness: No.

The Court: How did you know it was Mr. Bolich talking?

The Witness: My recollection is he said it was Bolich.

The Court: Did you recognize his voice?

The Witness: Yes.

The Court: All right. Go ahead. What did he say?

Q. What did he say to you?

A. He said that Davis was in his office in connection with the Gotham Beef case and that Davis was contending that the over-ceiling sales that were not recorded—the moneys received from that were used for the unrecorded over-ceiling purchases, and that they were contending that this thing was a wash, that there wasn't any tax evasion, that is, Davis was contending that, and that they had a lot of checks and invoices to substantiate that position.

So I told Mr. Bolich we would give that due consideration. I also pointed out to him at that time that Ronayne was the attorney as a matter of record, and Mr. Bolich—and I also asked him if they had any powers of attorney. Mr. Bolich said that Davis would submit powers of attorney at a later date.

[fol. 279] The Court: Where did Mr. Bolich call from? Was he in New York?

The Witness: It is my recollection he was in his own office.

The Court: In New York?

The Witness: Yes.

The Court: All right. Go ahead.

Q. Did that terminate this conference, that conversation with Bolich?

A. Yes.

Q. At the time Bolich called you was there a power of attorney on file on behalf of Davis?

A. Not to my knowledge, no.

Q. Was there any power of attorney on file which had been submitted on behalf of the taxpayer?

A. Not to my knowledge, with me, no.

Q. Well, any power of attorney to any attorney?

A. Well, yes, we had a power of attorney from Mr. Ronayne.

Q. Now, you testified that Bolich was your superior from the first part of 1946 until September, 1948, is that correct?

A. That is correct.

Q. During that time, during that period, how many times did Bolich call you?

A. So far as I recall this was the only time that he had called me.

Q. That is this telephone call about the Gotham Beef case?

A. That is correct.

Q. During that entire period of time did Bolich ever initiate any communication to you with respect to any tax case you were working on?

A. No. This was the only case I can recall.

Q. Well, what did you do after your conversation with Bolich?

A. Well, at that time I called Ronayne. I was in this situation: that I was to have a conference with Ronayne on August 3, and I did not want to prepare for the case and have that conference postponed and have that time wasted, as had happened in the previous postponement, because the procedure was that I would review a case [fol. 280] probably two or three days before the conference in order that I would be thoroughly familiar with it. So I called Ronayne and asked him if he was still representing the taxpayers and Ronayne said that he didn't know whether he was or wasn't, but that he would let me know, and either at the same day or the following day Ronayne called me and told me that he was no longer representing the taxpayer.

Q. Now you are familiar with the practice within the Bureau of Internal Revenue with respect to powers of attorney, are you not?

A. Yes, I am.

Q. And what is that practice?

A. Well, the practice is not to deal with anyone other than a taxpayer unless that person is duly authorized through a power of attorney from the taxpayer.

The Court: And that is so provided by regulations of the Bureau of Internal Revenue?

The Witness: Yes.

Q. Well, what did you do after you cancelled this conference with Ronayne?

A. Well, I received powers of attorney from Davis on this case, I think around August 5th, and after having received those powers of attorney I called Davis to arrange for a conference, which was done. The conference date was set for August 16, 1948. At that time I told Davis

that we must have the taxpayers present, and I believe I also told him that there weren't any contingent fee statements submitted with the powers of attorney, and to the best of my recollection I think Davis said that he would have those papers at the conference.

The Court: Under the regulations of the Bureau a contingent statement had to accompany the power of attorney?

The Witness: That is correct.

The Court: Stating whether the attorney has the case on a contingency basis or he doesn't?

The Witness: That is correct.

[fol. 281] Q. I show you Government's Exhibits 17 and 18 in evidence and ask you whether these are the powers of attorney which were submitted by Davis?

A. Yes, these appear to be the powers that were submitted at that time.

Q. I direct your attention to the stamp, received August 4, 1948, Intelligence Unit, Bureau of Internal Revenue. Are you familiar with the practice of the special agents' office with respect to placing receipt stamps on documents?

A. Yes, I am.

Q. Well, now, how was that stamp placed on the document?

A. Well, the procedure in the office is that when all mail is received on the 10th floor by the secretary, I think, of the agent in charge, they open the mail and they stamp every paper received during that day with the date stamp.

Q. I show you Government's Exhibit 23 in evidence and ask you what it is.

A. Well, this is a contingent fee statement. It is a Government form which is provided to taxpayers to submit with their powers of attorney.

Q. When did you first see these contingent fee statements?

A. The best of my recollection is that I received them on August 16 at the date of the conference.

Q. From whom?

A. From Mr. Davis.

Q. You will note that there is no received stamp from the Intelligence Unit on these contingent fee statements. Can you account for that?

A. Yes. I think that that fact is evidenced by the fact that they were presented to me personally and they did not go through the mail, and I never stamped anything that was received.

Q. During the entire time you worked on this case were any other contingent fee statements submitted?

A. By the taxpayer—by Davis?

Q. Yes, that is right.

A. No, not to my knowledge.

Q. Well, were any submitted by any representative of the taxpayer from the time these were handed to you on August 16th until the time that you finished your work on the case?

A. No.

Q. Now, what happened at the conference on August 16, 1948?

A. Present at the conference were Davis, Tobias—[fol. 282] Monroe Tobias—Louis Berman, Special Agent Mullenbach, and myself. Davis at that time submitted the power of attorney on Philip Berman and also the contingent fee statements on Louis and Philip, Gotham Beef and Gotham Ship Purveyors. At that time Davis excused the absence of Philip Berman with the statement that Philip was sick and irrational, and he submitted a letter from a doctor stating that fact. I was willing to go along with the conference as long as we had one of the principal taxpayers involved. I advised them of their constitutional rights and then asked Davis to proceed with whatever defenses or whatever information he desired to submit. Davis then went into a discussion as to the fact that the taxpayers really did not admit any sales at all, that they received over-ceiling payments, but that he also—they received over-ceiling payments to them and they had made over-ceiling payments to their suppliers, and actually, this was a wash, that any sales that were not recorded were sales which they had made as an accommodation to various friends, and I think, Louis Berman had an interest in a restaurant, I think it was the Valencia Restaurant, and that these were pure accommodations, and he made no profit on them whatsoever; actually there wasn't any evasion of taxes.

Tobias at that time submitted various checks and invoices which were to be evidence of the fact that these payments were not recorded. He also said, I think Davis said currency payments were paid to Isidore Frank above the ceiling price.

At the conference I requested Davis' cooperation in submitting of net worth statements on Philip Berman. We had already received net worth statements from Ronayne with respect to Louis.

I also requested him to submit a brief as to what had transpired at this conference, which he promised to do, and he also promised full cooperation in every respect with the special agent who was to investigate these additional [fol. 283] claims made by the taxpayer. The conference was then concluded.

Q. What further action did you take on the Gotham Beef case?

A. After that conference, I instructed Special Agent Mullenbach to work with Tobias and Davis in order to substantiate their claims or disprove them, as the case may be, and to submit a supplemental report.

Q. What happened after that?

A. Subsequent to that date, Mullenbach did submit a supplemental report on the matter, and I reviewed that supplemental report and wrote up a reversal memorandum.

The Court: Reversing what?

The Witness: Reversing the recommendation of criminal prosecution of Special Agent Mullenbach.

Q. Did you talk to anyone before you wrote up your reversal memorandum?

A. I am sure I had spoken to Mullenbach, yes.

Q. Did you talk to anyone else?

A. Yes, I spoke to Mr. Baradell.

Q. Who is he?

A. Mr. Baradell was my immediate superior. He was the special adviser to the special agent in charge.

Q. Who was Baradell's immediate superior?

A. Mr. Bolich.

Q. What was your conversation with Baradell?

A. I told Baradell that I considered the case a fifty-fifty proposition, that it was a weak case, and I would appreciate his comments on the matter.

Mr. Aranow: I can't hear the gentleman.

The Court: Keep your voice up.

The Witness: I told Baradell I thought the case had a fifty-fifty chance for prosecution, and that I would appreciate his comments with respect to whether or not we could sustain a prosecution. So he told me to—rather he requested I leave the file with him, and he would tell [fol. 284] me subsequently. Either that same day or the next day, Baradell handed the file back to me and told me that in his opinion it was a very weak case.

Q. Then you wrote your reversal memorandum?

A. And then I started— I don't just know how quickly thereafter I wrote it up.

Q. Did you contact Davis?

A. Yes, I did. I called up Davis and told him that this case was going to be closed civilly in our office. He insisted upon coming down to my office on the following day. I told him there wasn't any need for his coming down, that so far as I was concerned, the matter was closed, but he continued to insist, so I didn't see anything wrong about it, so I let him come in. Davis and Tobias appeared the following day, and I told them again at that time that the case would be closed but that we would recommend the fraud penalty.

The Court: When you say closed, you mean it would be closed civilly with no criminal prosecution?

The Witness: That is correct.

Q. Can you fix the date of that conference with Davis and Tobias?

A. I think that was October 27th when the telephone call—I think it was October 28th they had come into the office.

Q. 1948?

A. 1948.

Q. What did you do after this conference?

A. After the conference, why, the case was processed. The files were sent over to Brooklyn for civil settlement.

Cross examination.

By Mr. Aranow:

Q. Mr. Kuehl, you are still employed with the Government?

A. Yes, I am.

Q. Were you in the special agent's office at the time when Mr. McQuillan was there?

A. Yes, I was.

[fol. 285] Q. Did you know the policy of the office with reference to cases that were recommended for prosecution under the regime of Mr. McQuillan?

A. I think I have a fair knowledge of it, yes.

Q. At that time, was there any review section for that work?

A. As such, no.

Q. Under the McQuillan regime, the matter was reviewed by Mr. McQuillan or Mr. Murphy, his assistant?

A. It was either reviewed by Mr. McQuillan, Mr. Murphy or some senior agent that they would designate to review the case.

Q. And the purpose of the review was what, Mr. Kuehl?

A. The purpose of the review was to determine whether or not the special agent's recommendation conformed with the evidence.

Q. Wasn't it more than that? Didn't you also review whether the evidence would be in the opinion of the reviewer sufficient to warrant a prosecution?

A. That is correct.

Is that right?

A. That is quite right.

Q. Under Mr. McQuillan's staff, how many special agents were there? Do you remember?

A. I would say prior to—of course, I was in the service in 1945, but I would say prior to that date, we had approximately 35 agents.

Q. When Mr. Bolich became special agent in charge, how many agents were there under him?

A. I would say around 190.

Q. In 1948, about how many were there?

A. Maybe 150.

Q. And most of these agents had been taken up after the war and put on the payroll, new men?

A. The majority of them were taken up in the fall of 1945.

Q. At the time that Mr. Bolich told you that Mr. Davis was in his office or you gathered that he was, did he ask you to do anything improper with relation to that case?

A. No, sir.

Q. Did he ask you to make any false report on it?

A. No, sir.

[fol. 286] Q. Did he ask you to make a wrongful report on it?

A. No, sir.

Q. Did he ask you to do anything in connection with the case?

A. No, sir.

Q. When you made a decision, was that based on your judgment?

A. It was.

Q. Uninfluenced by anybody?

A. No.

Q. By your best judgment?

A. By my best judgment.

Q. And when you were in doubt, you went to Mr. Baradell, your chief. Is that correct?

A. That is correct.

Q. And Mr. Baradell is a man of long experience in the Internal Revenue?

A. He is.

Q. And to your knowledge, he is a reputable, honest person?

A. He is.

Mr. MacMahon: I object. That is calling for a conclusion.

The Court: Do you know if that is his reputation?

The Witness: So far as I know, he has a good reputation, yes.

Q. After you left the papers with Mr. Baradell, did he confirm your opinion?

A. Yes, he did.
Q. And that was when? Do you remember?
A. It was either the same day or a day later.
Q. Can you give us approximately the date?
A. I think it was October 25, 1948.
Q. And was Mr. Bolich in 253 that time?
A. No, he wasn't.
Q. Who was in charge at that time?
A. Walter Murphy was acting agent in charge.

[fol. 287] ANDREW MULLENBACH, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Miss Goldman:

Q. Where do you reside, Mr. Mullenbach?
A. Guttenberg, New Jersey.
Q. At what address?
A. 65 70th Street.
Q. Where are you employed?
A. Intelligence Division of the Internal Revenue Service.
Q. Is that at 253 Broadway?
A. That is correct.
Q. And in what capacity are you employed there?
A. As a special agent.
Q. And how long have you been a special agent at 253 Broadway?
A. Since October, 1945.
Q. Prior to that time where were you employed?
A. I was in the United States Army from August, 1943, until October, 1945. I was still in the employ of the Treasury Department.

The Court: When did you start in the Treasury Department before that?

The Witness: In February of 1942, sir.

Q. And prior to the time you were working for the

Treasury Department, what was your occupation, Mr. Mullenbach?

A. I was an examining accountant for three years with the New York Curb Exchange, now the American Stock Exchange.

Q. Now before that were you connected with a brokerage firm?

A. That is correct.

Q. Were you a partner in that brokerage firm?

A. I was a junior partner for about six years.

Q. Now, are you familiar with the Gotham Beef case?

A. I am.

Q. When did you first become familiar with it?

A. Well, the case was assigned to me in May of 1946.

[fol. 288] Q. What were you assigned to do about the case?

A. I was to investigate indications of fraud and evasion.

* * * * * * *

Q. What was the total of the unreported purchases you ultimately after investigation substantiated?

A. About $160,000.

Q. As compared with how much in unreported sales?

A. $280,000.

Q. Did you take any official action as a result of your findings?

A. I wrote a final report.

Q. Did you submit any recommendation?

A. In that report I recommended that Louis and Philip Berman be prosecuted for filing a fraudulent partnership return for the year 1943 and a fraudulent corporate return for the Gotham Ship Purveyors for the fiscal year ending March 31, 1944, and the fiscal year period ending March 31, 1945, for the corporation; it was a short period that the corporation functioned in 1944; and against the individuals Louis and Philip for the years 1943 and 1944.

Q. Coming to the individuals again, had you found anything about them as a result of your investigation?

A. Yes. I found that they had made sales in their individual names which I included in the total of the business sales, the verified sales of either Gotham Beef or Gotham Ship.

Q. Did their return reflect the true income of the companies with which they were connected?

A. No.

Q. You said you recommended that the individuals be criminally prosecuted. At about what time did you make that recommendation, Mr. Mullenbach?

A. Yes. That was in my final report of the case that I submitted in April, 1948.

* * * * * * *

Q. Did you meet Mr. Davis thereafter?

A. Yes, I did.

Q. What were the circumstances of that meeting?

A. That was a conference which was held in our office, [fol. 289] which Mr. Kuehl, who was the assistant technical adviser at that time, conducted, and that was in the middle of August 1948, about the third week.

Q. Who was at this conference?

A. Well, there was Mr. Kuehl, who was conducting the conference, Mr. Louis Berman, Mr. Monroe Tobias, and Mr. Davis and myself.

Q. What occurred at this conference?

A. Well, Mr. Davis stated that he could bring in proof on the part of the taxpayers to the effect that there was no unreported income on the part of either the business entities or the individuals.

Q. How did he propose to show that?

A. His contention was that a lot of cash had to be paid for the overceiling prices of meat in order to acquire the meat.

Q. Did he submit data to you thereafter?

A. Yes, he submitted data.

Q. And what did you do with this?

A. The data that was submitted, the revenue agent, who was cooperating in the case, and I analyzed it and examined it in order to determine whether any of it could be considered as proof of purchases.

Q. Did you make any findings as a result of this examination of the additional data?

A. Yes, we did.

Q. What did you find?

A. We found that approximately $20,000 additional purchases could be allowed.

Q. And did you take any official action as a result of this finding?

A. I wrote a supplemental report.

Q. Did you make a recommendation in that report?

A. Yes, I did.

Q. And what was your recommendation?

A. I recommended that my original recommendation stand. It was a conclusion that I saw no reason to change my original recommendation.

Q. When did you make this supplemental recommendation?

A. That was in October 1948, when the supplemental report was written.

[fol. 290] Q. Mr. Mullenbach, when you recommend criminal prosecution, what does it mean about your findings as to intent?

Mr. Aranow: I object, if your Honor pleases. It is improper in form.

Miss Goldman: I will rephrase the question.

The Court: Rephrase the question.

Q. Do you or do you not make any findings as to the intent of the taxpayers when you investigate a possible tax fraud?

Mr. Aranow: I object to the question on the ground it is improper in form, calling for a conclusion, and not the best evidence.

The Court: Objection overruled.

Mr. Aranow: Exception.

The Court: You may answer. You make findings of fact as to the intention of the taxpayer?

The Witness: Yes, sir.

The Court: That is your regular standard procedure to do that?

The Witness: Well, we have to have some evidence of intent that the sales or the income wasn't reported.

The Court: You are saying that you find not merely that the income was unreported, but you find that there was an intent——

Mr. Aranow: I object to the form of that question.

The Court: I am just trying to get the facts.

Mr. Aranow: I know, but I am afraid your question is improper, your Honor, and I object to it.

The Court: If my question is improper, I will withdraw it then. Let the young lady try and rephrase it.

[fol. 291] Q. In the Gotham Beef case, did you make any findings of fact as to the intention of the taxpayer?

A. Yes, I did.

Q. And what did you find?

Mr. Corbin: I object to it. If I may make one objection, it is incompetent, calling for a conclusion, not the best evidence, and there is no foundation laid for it. We don't know whether this finding being inquired about is oral or in writing. If in writing, the writing is the best evidence. I think the inquiry generally is objectionable.

Mr. MacMahon: Your Honor, may I be heard?

The Court: Yes.

Mr. MacMahon: On the best evidence point, obviously, the best evidence is the man who wrote the report and not the report itself. On the question of conclusion, this witness is qualified to make such a conclusion. In fact, that is the job that he was assigned to undertake and to reach such a conclusion. And the facts on which he based that conclusion, I submit, are relevant and pertinent to this case.

The Court: Of course, in this case, we are not trying the question as to whether the Gotham Beef case is guilty of income tax violation. We are considering something else. If it were a question of the Gotham Beef Company's liability, I might rule otherwise; but here is a witness who says that he recommended criminal prosecution in this case, and the question simply is on what basis did he recommend it.

Mr. MacMahon: Exactly.

The Court: Therefore, I will allow the witness to testify as to the basis upon which he recommended criminal prosecution.

Any objections to the question are overruled.

Mr. Aranow: I will take an exception to that.

[fol. 292] Mr. Corbin: I had in mind that this man is not

a court rendering decisions which may be of any evidential value here, and any finding——

The Court: The question as to whether the Gotham Beef Company was guilty of an intent to defraud is not before this jury. There are other questions before this jury, but one of the preliminary matters of evidence here is that apparently this man recommended criminal prosecution, rightly or wrongly. Now, I think it is a perfectly proper queston on what basis did he recommend criminal prosecution. Rightly or wrongly, he recommended it. Therefore, I think the question is proper, and he may be allowed to state that.

Mr. Corbin: Then aren't we taking his conclusion as some evidence of the truth or accuracy of it? I may be getting rather technical——

The Court: I think you are a little far afield because, as I understand it, the principal in the Gotham Beef Company admitted on the stand an understatement.

Mr. Aranow: It wasn't admitted he had a wrongful return. He didn't say he was guilty of a fraud.

Mr. Singer: He denied his intent here in court.

The Court: I will let the witness answer the basis upon which he made his determination.

You may answer that question. What was the basis upon which you made your determination that there should be criminal prosecution?

Mr. Corbin: I take exception to that.

Mr. Aranow: I respectfully except.

The Witness: The fact that all the sales were not on the books or reported in the returns; the fact that checks were cashed, corporate checks; the fact that certain of the corporate checks and partnership checks went into the individual bank accounts; the fact that on the books of the [fol. 293] partnership and the corporation in certain instances, checks received from a customer were not credited in their entirety to the customer, but paid to a loans and exchange account and that money drawn off to the individuals; the fact that certain entries did not appear on the books of the corporation. Those facts all led me to the conclusion that there was an evasion of income taxes.

Q. Did you investigate the method of keeping invoices?

A. Yes, I did, and I might add that that was another contributory factor.

Q. And what did you discover about the method of keeping invoices?

A. They would write an invoice out — when I say "They," an invoice was written out for a certain amount of money, which was sent to the customer. The duplicate of that invoice was re-written in certain instances to have the figure which they wanted to appear to show on their books.

Q. In what way did you consider this evidence?

Mr. Aranow: I object to that form.

The Court: I will sustain the objection to the form of the question.

Q. Did you make any finding as a result of this method of keeping invoices?

Mr. Aranow: I make the same objection.

The Court: Objection overruled.

Mr. Aranow: Exception.

Mr. Corbin: I make the same objection, and if the finding is written, that is the best evidence. I don't understand that this witness has any function or authority to make a finding, Judge.

The Court: This witness had authority and function to make a finding in the Bureau of Internal Revenue, which, as the testimony shows, was reversed by his superior. But [fol. 294] he is perfectly competent to say what his finding was.

Mr. Corbin: That is a recommendation, Judge, and that is in writing, but we know what a finding is.

The Court: Mr. Corbin, he made a recommendation based, as he says, upon certain findings. Now, he is stating what his findings were, which was the basis of the recommendation.

You may answer.

Mr. Aranow: I respectfully except.

Mr. Corbin: Exception.

The Witness: Will you repeat the question?

The Court: Will you read the question, please.

(Question read.)

A. Not just the invoices alone, but in connection with the manner in which the receipts of the corporation and the business entities were handled, yes. I came to the conclusion that they had evaded taxes.

Q. Did you make any specific findings with respect to wilfulness?

Mr. Aranow: I object to the same question, not proper proof, not best evidence.

The Court: Objection overruled.

Mr. Corbin: May I have the same objection I made before without repeating it?

The Court: You may.

You stated that you found they had evaded taxes. Did you reach any finding as to whether that was done wilfully?

The Witness: Yes, I did.

Q. On what basis did you reach that conclusion?

Mr. Aranow: Same objection.

The Court: Objection overruled.

Mr. Aranow: I respectfully except.

[fol. 295] A. On the basis that all the income was not reflected in the income tax returns of Gotham Beef and Gotham Ship Purveyors, Incorporated.

Miss Goldman: No further questions.

Cross examination.

By Mr. Aranow:

Q. We had an OPA at that time, didn't we?

A. That is right.

Q. And there were certain rules and regulations in reference to prices of commodities and meat particularly?

A. That is right.

Q. And you know that during the war times there were a great many merchants who indulged in what they call overmarket prices?

A. That is right.

Q. You found that in your investigation?

A. I don't say that I found it in my investigation.

Q. You didn't find it so?

A. I didn't say I did. I wasn't looking for OPA violations.

Q. I didn't think you were. Who was the greatest supplier to these Gotham people? Who was the man they bought most from?

A. Well, a considerable amount of the merchandise was bought from Frederick P. Cooper & Company, I believe, and also from Washington Beef Company.

Q. Anybody else?

A. Those two were the largest. There were a lot of other places they bought meat.

Q. Did you ever know a man by the name of Frank they bought merchandise from?

A. I. Frank was in Washington Beef Company.

Q. Did you know that during the years of 1942, 1943 and 1944, Mr. Frank had been convicted three times of violating OPA price regulations in this court?

A. No, I didn't know that.

Q. Did you make any investigation about that?

A. No, sir, I did not.

[fol. 296] Q. Didn't the Gotham people tell you when they bought merchandise from Frank, they had to give him money under the table?

A. That contention came out in connection with the information submitted to arrive at the supplemental report.

Q. Did you go back to Mr. Frank and endeavor to check up whether or not there was money paid under the table?

A. Yes, I did.

Q. Did the taxpayer tell you that he had to pay other people under the table as well?

A. The taxpayer said that through their representative that they had to pay cash for the overceiling payments, and they didn't say it was all to I. Frank. They just said they had to pay it.

Q. Did you investigate the other merchants who sold them merchandise as to whether or not they had received cash money under the table?

A. Wherever I checked, I asked what was the full amount of the purchase and took it from their books, and the point was that there was no additional sales made by those people to the taxpayers.

Q. You mean you couldn't find any on the records?
A. That is right.

* * * * * *

Cross examination.

By Mr. Singer:

Q. Mr. Mullenbach, you are familiar with the practice in the special agent's office, aren't you?
A. The practice——
Q. The practice of handling these cases where there is an element of fraud or a possibility of fraud involved. You are familiar with that, aren't you?
A. Yes, I would say so.
Q. A revenue agent comes from any district, for example, in this case, from Brooklyn, and is examining a case and finds that there is a possibility that there may be fraud involved. He refers it to a special agent. Is that right?
A. That is right.
[fol. 297] Q. Then the special agent and the revenue agent work together on it. Is that right?
A. That is right.
Q. Then you make a recommendation?
A. That is right.
Q. Then your report is reviewed, first, by the reviewing officer in your own office. Is that right?
A. That is right.
Q. Now, then, that report is again reviewed by the agent in charge of the office before the recommendation is passed on. Is that right?
A. I believe that the technical adviser does that for the special agent.
Q. Then it goes to the penal division at 253 Broadway for them to review whatever you or anybody else has done. Is that right?

Mr. MacMahon: I object to that question. It is immaterial in this instance.
The Court: To an appeal unit, did you say?
Mr. Singer: I said to the penal division.
The Court: I will allow him to tell about this practice there, Mr. MacMahon.

Mr. MacMahon: I submit it is not relevant in this case.

The Court: I don't think it is material in this case, but I will allow the question.

Mr. Singer: I want to show, if your Honor wants to know why I am doing it, that there are six reviews of each matter where prosecution is involved.

The Court: Is recommended.

Mr. Singer: Where prosecution may be recommended, where it may be reviewed, reversed or affirmed.

Mr. MacMahon: The Government will so concede, and we submit it is immaterial in this instance because it never left the special agent's office.

The Court: I think you are right. It is not particularly material in this matter for any reason, but I will allow the witness to explain it.

Mr. MacMahon: The Government concedes that.

[fol. 298] Q. Do you know that the penal division then passes on it?

it?

A. Yes.

Q. Then you know it is referred to the revenue department in Washington. Isn't that right?

A. I don't know the complete channel.

Q. You do know then that it is referred to Washington, to the Internal Revenue Department in Washington. Isn't that right?

A. I believe that is so.

Q. And there again it has to be reviewed, and all of the prior actions may be affirmed or reversed. Isn't that right?

A. That is true.

Q. Then it goes to the Attorney General's office, where all prior actions with respect to prosecutions are reviewed and may be affirmed or reversed. Isn't that right?

A. I believe that is right.

Q. And from there it goes to the United States Attorney in the field. That is the District United States Attorney, so in this particular case, it would come to Brooklyn, where again it would be reviewed and anybody else's actions might be affirmed or reversed. Isn't that right?

A. I believe that is right.

The Court: You said affirmed or reversed. If there is

a determination of no prosecution on one of those steps, then is that question reviewed on appeal? For example, in this situation, if Mr. Baradell or Mr. Bolich said no prosecution, then does that come up to a penal unit or is it only the recommendations for prosecution that go up?

The Witness: It is only the recommendations for prosecution which are confirmed that go forward to the penal division.

The Court: If there is a determination of no prosecution, then it stops at that point. Is that right?

The Witness: That is my understanding.

[fol. 299] Q. When your findings were reversed Mr. Bolich was not the agent in charge. That is the fact, isn't it?

A. That is correct.

Q. And as far as you know Mr. Bolich had nothing whatever to do with reversing your findings? As far as you know?

A. That is correct.

Q. Now, Mr. Kuehl was the man as far as you knew who said that he differed with you on this case, isn't that right?

A. That is right.

Q. There was no difference between you and Mr. Kuehl on whether or not the taxpayers had made a bad return or even a false return; the only difference was whether the case was weak or strong, isn't that right?

A. That is correct.

Q. Mr. Kuehl had more experience than you, didn't he?

A. That is correct.

Q. And he was regularly supervising your work or reviewing your work and other people's work in the office, isn't that right?

A. That is correct.

Q. So that the only difference of opinion, if we get it down to words, was that one man, you, felt there was a strong case with your two years of experience and Mr. Kuehl with his six or seven or ten years of experience felt that it was a weak case, isn't that right?

A. That is correct.

Q. Now, Mr. Baradell, who was above Mr. Kuehl, who had thirty years experience, agreed with Mr. Kuehl, isn't that right, apparently, as we heard it here today?

The Court: Do you know?.
The Witness: He must have. He was his superior.

. . . . . .

Q. Now, let me ask the next question: You, I assume, had talked to Mr. Ronayne during the two years that he was representing the taxpayer, hadn't you?

A. Yes, sir.

Q. Will you agree that at this conference in August of 1948, that evidence was submitted that Mr. Ronayne had never showed you, isn't that right?

A. That is correct.

[fol. 300] Q. Now, will you agree that you had every right yourself to reinvestigate the case in August when information was given to you that you didn't have when you wrote the report in April? That is correct, isn't it?

A. Yes.

. . . . . .

Q. Now, that is something, let us get that clear—that was the first time you heard that, in August, 1948, isn't that right?

A. That money had been given——

Q. To Frank.

A. ——to Frank, yes.

Q. Now then, you will agree, will you not, that with that information it was right for you to go out and check?

A. That is right.

Q. Is that correct?

A. Yes.

Q. Because if they could show that they paid all this difference out, this difference in sales, then there might be no tax due at all?

A. That is correct.

Q. So you went out and checked, is that right?

A. That is correct.

Q. You say you checked it and wrote another report in the early part of October—whatever date it is. I am not interested; you wrote another one, is that right?

A. That is correct.

Q. So that the conference and the reinvestigation you believe were perfectly proper up to that point?

A. That is correct.

* * * * * * *

Q. Now, tell me, with respect to this business of I. Frank, did you personally go out to interview I. Frank?

A. Yes, sir, I went up.

Q. Did he talk to you, Mr. Frank himself, personally?

A. As I recall I did speak to him.

Q. And did he admit that he had gotten any under-the-table payments in currency?

A. No, sir.

Q. As a matter of fact you ran into very few people during that time that were willing to admit that they had gotten under-the-table payments in currency, isn't that so?

A. That is correct.

[fol. 301] Q. That is correct. So that the only verification you could have of under-the-table payments would be to go ask the man whether he would admit that he had gotten cash that he had not reported, isn't that so?

A. That is correct.

Q. Now, don't you remember a discussion at that conference with Mr. Kuehl as to the reliability of that kind of testimony, as to whether or not you could rely on such testimony either to make a case or to make a decision in a case?

A. Not at that conference.

Q. Was it ever discussed any other time?

A. After the conference.

Q. Yes, that is right.

A. Mr. Kuehl—I had gotten the fact from Mr. Frank that he had not received that. Mr. Kuehl pointed out that Mr. Frank had been in difficulty on taxes himself in prior years and that he had made a disclosure in our office, and that he wasn't, he might not be considered a reliable witness.

Q. In other words, Mr. Kuehl showed you himself that although you had an affidavit from Frank which said that he never received any money, that Frank himself had already admitted in his own tax troubles that he had received some under-the-table money, isn't that so?

A. No. Mr. Kuehl's discussion as to Mr. Frank's background was for prior years.

Q. That is right, for prior years.

The Court: Well, let the witness answer the question.

The Witness: Well, for years prior to our investigation.

Q. So that there was in this case a discussion between you and Mr. Kuehl as to the value, the evidentiary value of certain testimony, isn't that right?

A. That is correct.

Q. And Mr. Kuehl even on that took a different position than you did, right when you were there, isn't that so?

A. I would say yes, that is so.

[fol. 302] Q. As a matter of fact, you wanted to rely on the affidavit that you had received from this man Frank denying that he had received under-the-table payments. Isn't that so?

A. That is correct.

Q. And Mr. Kuehl rapidly showed you that that man Frank's word couldn't be taken, didn't he?

A. I don't know whether I can say yes to that, because I pointed out to Mr. Kuehl that I had obtained evidence, well, from Frank, that there had been $70,000 in additional purchases by these people which were not on the books.

Q. But Kuehl said that Frank was a person whom the Government didn't want to trust or believe or rely on. Isn't that right?

A. In effect, that is correct.

Q. So that on a specific issue of a certain witness in this very case, there was a difference of opinion between you and Kuehl. Isn't that right?

A. That is correct.

Q. For which Kuehl gave you his reasons?

A. That is correct.

Q. Based upon prior Revenue Department Service experience with that witness, Mr. I. Frank. Isn't that right?

A. That is right, and the New York State experience.

Q. And what?

A. And the New York State income tax experience.

Mr. Singer: That is all.

ISIDORE DAVIS, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. McMahon:

Q. State your full name?
A. Isidore Davis.
Q. Are you sometimes known as Irving Davis?
A. Yes, sir.
Q. In the years 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953 and 1954 were you a member of the Bar?
A. Yes, sir.
[fol. 303] Q. Were you practicing law in the City of New York?
A. Yes, sir.
Q. Where did you maintain your office?
A. At 535 Fifth Avenue.
Q. Were you a tenant of office space in that building?
A. Yes, sir.
Q. Did you lease space?
A. I did.
Q. Do you recall who were your co-tenants on that lease?
A. Mr. Halperin.

* * * * * * *

Q. Now, did there come a time when you heard of a company known as Pattullo Modes, Inc.?
A. Yes, sir.
Q. Can you tell me when that was and the circumstances under which you heard that name?
A. On June 9, 1947 upon my arrival in New York Mr. Hoffman showed me a check of Pattullo Modes in the sum of $7,500 made payable to the order of Schopick & Davis, dated June 9, 1947. I asked him who was Pattullo Modes. He said, "Pattullo Modes is a firm in New York engaged in the business of manufacturing dresses."
"How did you get to know them?"
He said he was introduced to them by his brother-in-law Herman Deutsch.
I said, "What is this for?"

He said, "It is a retainer in a tax fraud case"; that this firm is involved in a tax fraud case, that they had made a substantial amount of off-the-record sales, and that I would meet the accountant of the firm and the principals of the firm later in the day or the next day or perhaps the day after the next. Later on the same day he told me that actually he had learned of the name Pattullo Modes while playing golf with Mr. Max Steinberg; Mr. Max Steinberg was a member of his club, and that Mr. Max Steinberg told him that one of his agents was working on a very substantial case, and that he had gotten the name from Mr. Steinberg, and that actually he met the principals through [fol. 304] another intermediary, a man that Deutsch knew, a fellow by the name of Katz.

Q. Did you after this conversation with Hoffman meet with a man named Smith?

A. Yes, sir.

Q. Where?

A. At our office at 535 Fifth Avenue.

Q. Who was present and what was said?

Mr. Aranow: May I have the date?

Q. About when was this?

A. Either June 9th or June 10th, within a matter of a day or two.

Q. Either the day you got the check or the day after, is that right?

A. That is right.

Q. Who was present?

A. Mr. Hoffman, Mr. Smith and myself.

Q. What was the conversation?

A. Mr. Smith told me that he was an accountant for Pattullo Modes. I asked him to tell me about the case. He said that the principal stockholders had made a very substantial amount of off-the-record sales, that it was in excess of $300,000. I asked him what did they do with the proceeds or how did they handle the proceeds through the books of account. He said that these sales were made principally to a retail sales, a retail dress firm in Brooklyn by the name of Loehmann's, that the checks which were given in payment of those off-the-record sales were de-

posited in the main in the bank account of Pattullo Modes, Inc., that a substantial portion of those proceeds were credited to the loans receivable account, supposedly as repayments of loans made by the corporation to the stockholders, and that in other instances the money was deposited and no reference made whatever to them in the books of account; that counterchecks would be drawn during the same months for the amount of the checks received from Loehmann's which were not reflected in the books of account, so that the balance at the end of the month would be in conformity with the bank statement.

Q. Now, did he say anything about whether Pattullo Modes had reported these off-the-record sales on their income tax returns?

A. He said they had not.

[fol. 305] Q. What years were involved? What income tax years were involved?

A. I believe 1942, 1943, 1944, 1945 and 1946.

Q. Did he tell you how these off-the-record sales came to his attention?

A. He said that an examination had been made by Revenue Agent Scherm during the month of January or February 1947, that the examination was concluded tentatively with the submission of an 870 form.

Q. What is an 870 form?

A. Well, it is a form that is used by the Treasury Department at the conclusion of an examination indicating tentatively what the agreement was between the taxpayer and the Government with respect to any additional tax liability.

Q. And it is an agreement between the taxpayer and the Treasury to pay certain additional taxes, is that correct?

A. That is correct. And that within a few days thereafter still another 870 was submitted for signature which involved a somewhat greater tax liability or somewhat greater additional tax liability, that that had been signed and I believe transmitted; that within a matter of a month or six weeks thereafter Mr. Scherm came back to the premises of Pattullo Modes after first communicating with Mr. Smith and then told Mr. Smith that he had just been put in possession of Form 917 which indicated that Pattullo

Modes, Inc. had made substantial off-the-record sales, which form apparently had been delayed in transmission.

Q. After you met with Smith, which you said was either the day Hoffman showed you this check or a day or so thereafter, did you meet with anyone else from Pattullo Modes, and if so, when and with whom and where?

A. I met with Mr. Marks and Mrs. Segel of Pattullo Modes, both stockholders of the corporation.

Q. When was that?

A. Either the 10th or the 11th or the 12th of June, 1947.

[fol. 306] Q. And where?

A. At our offices, 535 Fifth Avenue.

Q. Who was present at this meeting?

A. Mr. Marks, Mrs. Segel, Mr. Hoffman and myself.

Q. What was said?

A. I told them of my conference with Mr. Smith and recapitulated for them the information that had been given to me by Mr. Smith, and they said that that was quite correct. They asked me what the situation was and was there a chance of their getting into real difficulty, was there a chance of their going to jail. I said, Well, there was, of course, but it was way too early to tell, and I recommended that an audit be made by an independent firm of accountants for the purpose of learning all of the facts with respect to the tax evasion.

Q. Was there any mention of a Jo Copeland in this conversation?

A. Mr. Smith had told me that the Pattullo Modes, Inc., had a contract with Jo Copeland, the designer, by the terms of which she was to share in the profits of the firm on a graduated basis, and that therefore she would share in the amount of these off-the-record sales, and that she was very important to the firm, that the success of the business depended in a great measure on her work.

Q. What did they say?

A. They said the same thing, they were terribly concerned about the impact of this case on their relationship with Jo Copeland.

Q. What did you tell them, Marks and Segel, at this time?

A. I told them, when they spoke about getting into real difficulty, that it was far too early to tell just what the ultimate outcome would be; that the case was presently in the Revenue Agents' office; that thereafter it should go and would go in the ordinary course of events to the special agents' office; that after the special agents' office was through with the case and asuming there was a recommendation of prosecution, we then have an opportunity to discuss the matter with the Treasury Department in Washington; and that if the recommendation was affirmed or continued, we would have an opportunity to discuss it with the Department of Justice in Washington.

* * * * * * *

[fol. 307] Q. Did you continue to have conferences with Marks, Segel and Smith over the course of the sunimer of 1947?

A. I did, many. Those conversations and those meetings concerned themselves chiefly with the preparation of the accounting data for the purpose of getting together the report which I asked Weisberg and Greenstein to submit to us.

I also met with Weisberg and Greenstein in connection with their work, and in the course of it they told me they were having difficulty getting the cooperation of Mr. Smith; that they felt that the work would go along so much more speedily if they did have Mr. Smith's cooperation. I spoke to Mr. Smith about it and he said that he had other clients to take care of; that his time was heavily occupied, and that he could only give a portion of his time to Pattullo Modes; that Pattullo Modes had not been extremely lavish in their payments to him before for the work he did for them, and he felt he could never be sufficiently compensated for the time he was going to spend on this audit with Weisberg and Greenstein.

I received several complaints and I transmitted them on each instance to Mr. Smith, and finally in an effort to get him to cooperate more fully, I said, "Look, if it is a question of money and you can't get paid from your clients, I

will pay it, but you will be compensated. It is important, however, that you should continue with the work."

Q. Did your clients ask you for any progress reports on this case during the summer of 1947?

A. They asked me and I told them that there was no occasion to insist on a progress report every day, that the case was still in Ninth Avenue—that is to say, in the revenue agents' office in Ninth Avenue—and until it moved on, there was no cause for alarm.

. . . . . .

Q. Did there come a time when Weisberg & Greenstein completed their audit?

A. There came such a time.

[fol. 308] Q. About when?

A. The latter part of August or September, 1947.

Q. Did that audit show the extent of the off-the-record sales?

A. Yes.

Q. What was the extent of such sales, to the best of your recollection?

A. Approximately $330,000.

Q. As the lawyer for Pattullo Modes, did you after that report and your conferences with them reach any opinion as to the merits of the case?

A. Yes, I did.

Q. What was your opinion?

A. I knew of no merits to the case. I knew of no defense to the case.

Mr. Aranow: I can't hear the gentleman.

The Witness: I knew of no merits to the taxpayer's case.

Q. After the completion of the Weisberg & Greenstein audit, what was the next thing you did with respect to the Pattullo Modes case?

A. I think the next thing that I did in the Pattullo Modes case was to discuss the matter with Mr. Schwaeber.

Q. When was that about?

A. In either September or the first part of October, 1947.

Q. Who went to see Schwaeber?

A. Mr. Hoffman and myself.

Q. What was your purpose in going to see Schwaeber?

A. To engage him on behalf of the taxpayers.

Q. To act in what capacity or for what special reason?

A. To represent them when the case went to 253 Broad way, the special agents' office.

Q. What talks did you have with Mr. Schwaeber?

A. I told Mr. Schwaeber the nature of the case. I told him of the extent of the off-the-record sales. I told him an audit had been made, that a report had been submitted, that I knew of no offsetting items, and that I would like him to represent the taxpayers.

Q. Who was the head of the special agents' office in New York at that time?

A. Mr. Bolich.

[fol. 309] Q. Was Mr. Bolich's name mentioned in your conferences with Mr. Schwaeber?

A. Yes. Mr. Schwaeber said he wasn't sure that he would like to represent the taxpayers; that his relationship with Mr. Bolich was not of the best, but he expected to form a partnership with a Mr. James Saver within a short while thereafter, and that he knew that Mr. Saver's relationship with Mr. Bolich was far better, and if that partnership goes through, they would be in a position to represent the taxpayers.

* * * * * *

Q. Did you have any further meetings with Mr. Schwaeber?

A. With Mr. Schwaeber and Mr. Saver.

Q. When?

A. Within a matter of about a month after my first talk with Mr. Schwaeber about the case.

Q. That would be about when in 1947?

A. Somewhere around October of 1947.

Q. Who was present?

A. Mr. Hoffman, myself, Mr. Saver and Mr. Schwaeber.

Q. What was the substance of that conversation?

A. Mr. Schwaeber briefly told Mr. Saver about the nature of the case, and that he expected that Mr. Saver would take care of the matter once the partnership was formed, and Mr. Saver indicated that he would.

* * * * * *

Q. Did you have any further conferences as to what steps were to be taken in the Pattullo case?

A. Somewhere in December, Mr. Schwaeber and Mr. Hoffman and I discussed the voluntary disclosure policy of the Treasury Department, and Mr. Schwaeber said that it was his belief and understanding that a voluntary disclosure could be made by a taxpayer or his representatives at any time before the examining agent knew of any of the off the-record sales, and that it didn't matter that the form 917 in the Pattullo case had been floating around for some months so long as it had not reached the revenue agent's hands at the time that he was making the audit.

[fol. 310] Q. Prior to this talk in December of 1947 with Schwaeber, had there been any discussion whatever with anybody at any time about voluntary disclosure in connection with the Pattullo case?

A. None that I can remember.

Q. What did you do after this discussion with Schwaeber with respect to voluntary disclosure?

A. I saw Mr. Smith at my office and told him of my conversation with Mr. Schwaeber and said that if he could say that he told the revenue agent of any additional income, no matter how meager the information was, that that would be a voluntary disclosure according to Mr. Schwaeber's ideas.

Q. That is, if he told the agent before the agent told him. Is that it?

A. That is correct.

Q. What did Smith say?

A. He said, "Then it would be my word against Scherm's?" I said, "Yes." He said, "I am prepared to say that."

Q. Up to that time, had Smith ever indicated to you in any way, shape or form that he had made a voluntary disclosure to Scherm?

A. He had not.

Q. What was your state of mind with respect to what Smith said about it now?

A. I didn't believe that he had made any disclosure to the revenue agent.

Q. Did you discuss that matter at that time with your clients, Marks and Segel?

A. No, I did not.

Q. What if anything happened after these talks with Smith with respect to the voluntary disclosure?

A. I reported my conversation with Mr. Smith to either Mr. Schwaeber or Mr. Saver, and thereafter Mr. Saver arranged an appointment with Mr. Wheeler, who was the revenue agent in charge on Ninth Avenue, 341 Ninth Avenue.

Q. Were you present at that point?

A. I didn't go upstairs, but I accompanied—I and Mr. Hoffman accompanied—Mr. Saver, and waited downstairs while he and Smith were upstairs.

Q. Did they report to you while you were waiting downstairs?

A. Mr. Saver reported to me that while he was talking with Mr. Wheeler, Mr. Wheeler phoned Mr. Scherm and [fol. 311] asked him whether or not any disclosure had been made to him by Mr. Smith, and Mr. Scherm denied that any disclosure had been made.

Q. What if anything did Wheeler determine about the voluntary disclosure?

A. Mr. Saver told me that Mr. Wheeler said that since he got this information from Mr. Scherm, that he was prepared to accept the revenue agent's word for it, and that he would not regard it as a voluntary disclosure and did not believe that a voluntary disclosure had been made.

* * * * * * *

Q. Did there come a time when you learned that the case had gone down to the special agent's office?

A. Yes, some time during the month of February or March 1948, as a result of a conversation I had with Mr. Saver. I think it was from him I learned.

Q. What did Saver tell you?

A. Simply that the case was now in the special agent's office.

Q. Did you have any further talks around that time with Saver?

A. Mr. Saver told me some time during the month of March of 1948 that he had discussed the matter of a voluntary disclosure with Mr. Bolich, and Mr. Bolich said he

did not believe that a voluntary disclosure had been made.

Q. Did you have any talks among yourselves in the office, and, if so, with whom and what was said?

A. Mr. Schopick and Mr. Hoffman and I discussed the matter and said that time was passing by, and there didn't seem to be any help forthcoming in the Pattullo case, that we need some real help. We also discussed the matter with Mr. Halperin. I told Mr. Halperin about the case and said to him that this was a case where we needed some real help.

Q. What did you tell him about the case?

A. I told him the case involved a substantial amount of off-the-record sales in excess of $300,000, that I knew of no [fol. 312] defense on the merits of the case, it was a tough case, and we needed real help.

Q. What if anything did Halperin say?

A. He said he knew a man in Washington, a man he had known for a great many years, who was extremely influential and knew a great many people in Washington, and that if anybody could help, he would be the man to help.

Q. Did he tell you the name of the man?

A. Yes, he told me the name of the man.

Q. What name did he tell you?

A. Mr. Grunewald.

Q. What else did he say?

A. I said, "Well, why don't we go to him?"

He said he didn't believe he was on the best of terms with Mr. Grunewald, but that if I wanted to get to Mr. Grunewald, he knew a Mr. Moe Polakoff, an attorney in the city, who knew Mr. Grunewald well, and that he was pretty sure Mr. Polakoff would take us to him.

Q. Did Halperin say anything else about Grunewald?

A. That he was influential, that he knew Mr. Bolich, who was a special agent in charge, and had known him and was a close personal friend of his.

Q. Did you go to see Polakoff?

A. I did. I went with Mr. Hoffman.

Q. What happened there?

A. I told Polakoff the details of the case in a general way, just as I described them to Mr. Halperin, and told him also I knew of no defense to the case, and that this was

a case where we needed some real help; and he said he thought that there was a man in Washington that could help. I said, "Who do you mean?"

He said, "Mr. Grunewald." No, he said there was a man in Washington that could help.

I said, "Do you mean Mr. Grunewald?"

He said, "Yes."

I said, "Can you communicate with him? Will you go to see him for us?" He reached for a private telephone book on his desk and put in a call, I believe, to Washington and was unable to speak to Mr. Grunewald. He said that [fol. 313] he would try to reach him later in the day, and that he would communicate with us and tell us about an appointment if he could arrange one.

Q. Now, did you see Polakoff after that?

A. I did. He telephoned to say that he had made an appointment to see Mr. Grunewald in Washington and that we could go with him. Perhaps we asked to go with him.

Q. About when was this?

A. April or May of 1948.

Q. Did you go to Washington with Polakoff?

A. And Mr. Hoffman, yes, we did.

Q. What happened in Washington?

A. We went to the Washington Hotel, and Mr. Polakoff went to the desk and made a telephone call, and thereafter I saw him in conversation with Mr. Grunewald in the lobby of the hotel.

Q. Did you meet Mr. Grunewald?

A. I did not.

Q. What did you do after this trip to Washington? Did you come back?

A. We came back, yes, and Mr. Polakoff on the trip back to New York told us he had spoken to Mr. Grunewald about the Pattullo Modes matter; that Mr. Grunewald would look into it and would report to him, and that he in turn would report to us.

Q. Did you hear from Polakoff after that?

A. I believe that I did, a statement to the effect that he hadn't heard and that I was to stand by and wait.

Q. So far as Polakoff was concerned, what if anything else happened in the Pattullo case?

A. Nothing happened so far as Polakoff was concerned in the Pattullo case.

Q. And that is about the end of May or June of 1948?

A. That is correct.

Q. Did there come a time when you heard of a case called the Gotham Beef case?

A. I did.

Q. About when was that and how did that come to your attention?

A. The end of May or during the early part of June 1948, Mr. Leo Greenstein of the firm of Weisberg & Greenstein told me that a Mr. Merdinger of H. Merdinger & Company had spoken to him about a tax case that was pend-
[fol. 314] ing in their office, and that Mr. Greenstein had recommended us to this firm, and that I was to expect a telephone call from a Mr. Tobias, who was a member of the firm.

Mr. MacMahon: Your Honor, if you wish to take another recess this afternoon, this would be a convenient time.

The Court: All right, we will take a five minute recess.

(Short recess.)

By Mr. MacMahon:

Q. Mr. Davis, you had just started telling us about the Gotham Beef case, your introduction to the Gotham Beef case. Would you pick that up and continue?

A. Mr. Greenstein said that I was to expect a call from a Mr. Tobias, a member of the firm of H. Merdinger & Company of 61 Broadway. I did receive such a telephone call and I made an appointment to see him. I went to his office at 61 Broadway.

Q. Who went with you, if anyone?

A. I believe I went myself.

Q. Whom did you see, and what was said?

A. I met Mr. Tobias and also was introduced to Mr. Louis Berman.

Q. About when was this?

A. In either the latter part of May or the early part of June, 1948.

Q. Continue now. What was the conversation?

A. Mr. Tobias said that they were the accountants for two brothers, Philip Berman and Louis Berman; that they had been in the meat business together, both as partners and as stockholders of a corporation; that an income tax investigation had been conducted with respect to these companies and of themselves as individuals and that a Mr. Ronayne had been representing them; that these firms had made off-the-record sales somewhere in the neighborhood of $100,000; that a special agent by the name of Mullenbach had been on the case, and that he had recommended that [fol. 315] there be prosecution, and that these individuals had used all of the moneys that they had obtained from these off-the-record sales to make cash premium payments over the ceiling prices to the suppliers of the meat; that they had some documentary proof establishing that fact, but it was only of a small portion of these off-the-record sales.

Q. Did they tell you about what percentage of this $100,000 they had such proof?

A. I think somewhere between 10 and 20 per cent, in that neighborhood.

Q. And that was all?

A. That is all the documentary proof they had, and that he, Mr. Tobias, felt that Mr. Ronayne had not adequately gathered the information together and had not adequately represented the clients, and was there anything we could do about it.

Q. What did you say?

A. I said that I didn't know and I wasn't sure; that I would study the thing and report to him at some subsequent time.

Q. Now, was there any mention of a conference?

A. Yes. He said that a conference was set at 253 Broadway for some short time after my meeting with him and I asked that he adjourn the conference so as to give me an opportunity to look into the case.

Q. Now, following your meeting with Tobias and Berman did you have any talk with these people in your office and if so whom and what was the conversation?

A. I reported to—I came back and reported to Mr. Schopick and Mr. Hoffman and also mentioned my conversation with Mr. Tobias and Mr. Halperin.

Q. What did you tell them?

A. I told them about the case and I said, here, if we were in a position to help, this would be another matter we could get into.

Q. You say you told them about the case. What did you tell them?

A. I told them the case involved off-the-record sales in the neighborhood of $100,000, that the taxpayers contended all off-the-record sales proceeds were used to make cash premium payments, that Mr. Ronayne had been in the case, that Mr. Mullenbach, a special agent, had recommended prosecution.

[fol. 316] Q. About when was this?

A. About the middle part—the early part of June or the middle part of June.

Q. 1948?

A. 1948.

Q. Now, what next happened with respect to the Gotham case?

A. When I was on my vacation during the latter part of June and the first few days of July 1948 I received a long distance telephone call from Mr. Hoffman. I spoke with him and Mr. Halperin on the telephone.

Q. Did you recognize both their voices?

A. Yes, I did.

Q. Tell me what was said?

A. They told me they had gone to Washington, that Mr. Halperin had seen Mr Grunewald, that he was extremely well received by Mr Grunewald, and that Mr Grunewald was surprised that Mr. Halperin felt that he wasn't on the best of terms with him, and that he would look into the matter, and as a matter of fact, made a telephone call to somebody about the case in which Mr. Grunewald expressed his interest, in the Gotham Beef Company case.

Q. What did Halperin say on the telephone?

A. Essentially the same thing as Mr. Hoffman, and Mr. Hoffman said he felt that we could get into the Gotham Beef Company case. I said, "Wait until I get back to New York and I will get in touch with the accountant again."

Q. Did you get back to New York?

A. I did, sir.

Q. About when?

A. The first few days in July 1948.

Q. What did you do when you got back to New York?

A. They told me of their trip to Washington and repeated to me what they had said to me over the telephone, and I said that I would now telephone Mr. Tobias and I did, and I made an appointment with him.

Q. Did you have an appointment with Tobias?

A. I did, sir.

Q. Now, before we get into that, what did Mr. Halperin say if anything about Grunewald in your talk after you came back from your vacation?

A. He said that he was extremely well received by Mr. Grunewald and that Mr. Grunewald said he was surprised [fol. 317] that Mr. Halperin had felt that he couldn't come to see him, and that by all means he would with him and was glad to work with him.

Q. All right. Did you see Tobias now?

A. I did.

Q. Where did you see him?

A. At his office, 61 Broadway.

Q. Who was with you?

A. Mr. Halperin and myself went to see Mr. Tobias.

Q. I am sorry, I didn't hear that.

A. Mr. Halperin and I went to see Mr. Tobias.

Q. What was said?

A. We told him that Mr. Halperin had an associate in Washington that we were sure or felt confident would be in a position to help us in this case, meaning the Gotham Beef Company case, and we therefore wanted to undertake the Gotham Beef Company case.

Q. Did you describe this associate in Washington, D. C.?

A. As a person who was very influential in Washington, who knew a great many people.

Q. Did you mention any other case at that time?

A. I said to Mr. Tobias that as an indication of our confidence in Mr. Halperin's associate in Washington, that we were using him in the other case in the office, the largest case we had, the most important case we had.

Q. Did you tell him the name of that case?

A. I don't believe so.

Q. What if anything was decided at this meeting?

A. Mr. Tobias gave me more details with respect to the case and showed me I believe some of the documentary proof he said he had.

Q. What did that consist of?

A. Memorandums apparently in the handwriting of the supplier of meats to the Gotham Beef Company in which certain calculations were made with respect to the overages that were supposed to be paid or had been paid by the Gotham Beef Company people to the suppliers.

Q. Was there any mention of fees?

A. Not that I remember.

[fol. 318] Q. Was there any mention of a retainer?

A. There was no discussion except knowing that we were to go ahead, but there was no discussion as to a fee with respect to a retainer.

Q. What did you do then during this month of July with respect to Gotham?

A. I met several times or a good many times with Mr. Tobias, and perhaps on some of those occasions with Mr. Berman, Louis Berman, and worked with them on the preparation and gathering together of the necessary data for the contemplated conference. I also spoke with—I also saw Mr. Bolich during the month of July in connection with the Gotham Beef Company case.

Q. We will come to that a moment. Now coming back if you will to the early part of July on your return from your vacation, what transpired in the Pattullo case over this period in July?

A. During that same month I believe I learned from either the taxpayers or Mr. Schwaeber or Mr. Smith that the Government contemplated circularizing all of the accounts receivable, all the customers of Pattullo Modes, and the client told me that that would be a catastrophe to the firm, that their business would be terribly hurt, and that the banks would call in their loans, they would lose their credit standing.

Q. What did you say to them?

A. I said I would talk with Mr. Halperin about it and I did—we did.

Q. What did you say to Halperin?

A. I told him what the clients had said.

Q. What did Halperin say to you?

A. He said he wasn't sure he could do anything, but he would mention it to Mr. Grunewald.

Q. Did circularization ever take place as far as you know?

A. As far as I know it never took place.

Q. Now, did anything else happen in the early part of or up to the middle of July with respect to the Pattullo case?

A. With respect to what, sir?

Q. The Pattullo case.

A. I may have spoken with Mr. Sayer who told me he had been in touch with or that Mr. Clayton had spoken [fol. 319] with him and that Mr. Clayton was prodding him on starting an audit.

Q. Did you talk with Mr. Hoffman and Mr. Halperin about the Pattullo case in this month of July 1948, other than the circularization?

A. I can't remember at this time.

Q. Now, you said you saw Mr. Bolich in connection with the Gotham case in the latter part of July. How did that come about?

A. After we had been in the Gotham case for a short while Mr. Halperin and I discussed the Gotham Beef Company case and Mr. Halperin suggested that I go to see Mr. Bolich. I telephoned Mr. Bolich and was unable to speak to him. His secretary told me he was in conference and I should call back in a half hour and I did that and also on this time I believe was told that he was busy with Treasury Department officials from Washington and that she couldn't put me through.

Q. What did you do about that?

A. I told Mr. Halperin about the first and second call and I told him that I was expecting to call back in an hour after that and he told me that he had spoken with Mr. Grunewald and Mr. Grunewald said I was to continue to call Bolich and that I would be able to speak with him.

Q. Did you thereafter call Bolich?

A. I did.

Q. Did you reach him?

A. I did, sir.

Q. What was said?

A. I told Mr. Bolich that I was an attorney at 535 Fifth Avenue, that I represented the Gotham Beef Company people and there was a case pending in his office, I would like to have an appointment with him. He said, "When would you like to come?"

I said, "Any time. Now, even."

He said, "Well, I won't be able to see you until tomorrow morning." I think an appointment was arranged for 11 o'clock the next day.

Q. About when was this?

A. About the latter part of July somewheres between the 20th and the 30th.

Q. 1948?

A. 1948.

Q. Now, did you see Bolich?

A. I did.

[fol. 320] Q. When with respect to the telephone call?

A. The next day.

Q. Who was present and what was said and where did you see him?

A. I saw him in his office at 253 Broadway. I believe they were on the tenth floor. Just he and I were there together alone. I identified myself as the man who had made the appointment with him. I said I represented the Gotham Beef Company. I described the nature of the business, both Gotham Beef Company and Gotham Ship Purveyors, Inc. I said, "They are people charged with having made a substantial amount of off-the-record sales, but all of the moneys coming from those off-the-record sales had been used towards making cash premium over the ceiling payments and that as a matter of fact we had submitted or were prepared to submit financial net worth statement indicating that the taxpayers had not profited from these off-the-record sales."

Then he said, "You are going to submit that net worth statement?"

I said, "Yes."

He said, "Who is your conference with?"

I said, "Mr. Kuehl."

"When is it for?"

And I told him the day it was set for at that time and he said, "Well, submit everything to Mr. Kuehl," and I left.

Q. Now, up to this conference in the latter part of July had anything happened with respect to Pattullo Modes since we had left you returning with Mr. Polakoff from Washington way back in June?

A. When, after Mr. Halperin found out that he could work with Mr. Grunewald on the Gotham Beef Company, I asked him whether or not he was in a position to handle the Pattullo Modes case. And he said that he would inquire. He made a trip to Washington and found out that it was all right for him to work on the Pattullo case with Mr. Grunewald, and that if we owed Mr. Polakoff for the work he had done he should be paid.

[fol. 321] Q. Did you say Halperin went to Washington?

A. Right after my return from my vacation, I believe, he made another trip with respect to the Pattullo case.

Q. What did he report back? Whom did he see?

A. He saw Mr. Grunewald.

Q. What did he say Grunewald had said, if anything?

A. He said Mr. Grunewald had said, by all means he was quite prepared and quite happy to work with Mr. Halperin on the Pattullo case. He would prefer to do it against Mr. Polakoff.

Q. Was there any mention of Saver and Schwaeber made in this talk with Halperin?

A. I don't think right there and then.

Q. Was there later mention made?

A. Well, I asked Halperin whether they should be continued in the case. He said he had a discussion with Grunewald and Grunewald said he thought it would be better to leave them in the case so if by any chance a good result was achieved here that Schwaeber and Saver should not feel slighted and wonder why they couldn't get the same result.

Q. All right. Now, let us go back to the Gotham case. Did you have this conference with Kuehl?

A. We did.

Q. When was that?

A. The middle of August, 1948.

Q. Who was present and what was said?

A. Mr. Tobias, myself and Mr. Berman, Louis Berman appeared on behalf of the taxpayer. Mr. Kuehl was there and Mr. Mullenbach. Mr. Kuehl opened the conference by stating that if the taxpayers had any additional information to furnish that this would be their opportunity to do so. I and Mr. Tobias both started off by saying while it was true that these taxpayers had made these off-the-record sales, that it was their contention that all of the moneys had been used towards cash premium payments, and that we were in possession of documentary proof establishing a pattern of over-the-ceiling payments, that we didn't have all of it, but only a portion of the documents representing these calculations that I have described; but [fol. 322] that it was known that meat was in short supply during the war years and everybody was required to make over-the-ceiling payments.

Q. Did Mr. Kuehl reach any decision at that time?

A. He did not.

Q. Now, what did you do immediately after your conference with Kuehl, if anything?

A. We were asked to prepare a memorandum of what transpired at this conference, and we undertook to do and did.

Q. Did you submit it to Kuehl?

A. Yes, we did.

Q. Now, did you have any talk with your associates in your office about your conference with Kuehl?

A. I said to them——

Q. Now, who was "them"?

A. Mr. Schopick, Mr. Hoffman and Mr. Halperin, and told them what had transpired at the meeting with Mr. Kuehl, told them that I was to prepare a memorandum of everything that transpired at the meeting, told them we were supposed to submit additional net worth statements. I said I didn't think that Mr. Kuehl was very much impressed with the documentary proof we had submitted.

Q. What percentage of these off-the-record sales were you able to support with documentary proof, off-the-record purchases?

A. I should think about 10 or 20 per cent of the off-the-record sale money.

Q. And that was all you had?

A. All that Mr. Tobias had, or that I had.

Q. Now, did you report to your client in the Gotham case with respect to this conference with Kuehl?

A. Well, the client was—I mean one client was present. Mr. Berman was present.

Q. Yes. Did you have any discussion with them?

A. I think almost at the conclusion of our conference with Mr. Kuehl they as well as I expressed the opinion that Mr. Kuehl did not seem to be impressed with the claims we were making on behalf of the taxpayers.

[fol. 323] Q. Did you at anytime about this time have any discussion with your client in the Gotham case about fees?

A. Either immediately before the conference of August 16th or immediately thereafter Mr. Halperin reported to us at the office that he had discussed the matter of what Mr. Grunewald wanted with Mr. Grunewald, and Mr. Halperin said that he wanted something like $75,000 or perhaps an amount somewhat in excess of that, and I said we will meet with the clients and tell them, and we did.

Q. Who met with the clients and what did you tell them?

A. Mr. Halperin and I met with Mr. Tobias and with Mr. Berman and told them what Mr. Halperin's associate in Washington wanted, that he wanted $75,000.

Q. What did they say?

A. They said it was excessive, that it was too high, that they were not prepared to pay that kind of money or didn't have it to pay, and asked Mr. Halperin to see if he couldn't do any better for them.

Q. What did Mr. Halperin say?

A. He said he would talk with Mr. Grunewald—with his associate in Washington.

Q. At these conversations was the name of the associate mentioned?

A. No.

Q. By you?

A. No.

Q. Did they ever ask you who it was?

A. I am not sure, but if they did I didn't tell them.

Q. Was there any reference to the then status of the case at the time of the discussion of the demand?

A. Only that the conference had been concluded and that there was every likelihood that the next step would be taken by the Government of one kind or another, and we ought to dispose of the question of Mr. Grunewald's demands in the matter.

Q. Did they make any counter offer at the time of this discussion, the clients?

A. Yes. I think we asked them how much they thought that they are prepared to pay, and I think they said something about $25,000, and why should they be asked to pay this much higher amount. And we told them that Mr. [fol. 324] Grunewald did not need their case, that he was a person of wealth, and if they didn't feel this was what they should pay, they shouldn't, and that would be the end of it.

Q. You said Grunewald. Did you mention Grunewald to them?

A. No, I never mentioned to Mr. Tobias or to Mr. Berman the name of Mr. Grunewald.

Q. Did you say anything about the results you expected to achieve?

A. We told them, Mr. Halperin and I, we were both confident that the result would be a good one, that there would be no prosecution, and no part of the money would be paid over unless it was clear that there would be no prosecution in the case.

Q. Now, was there any further talk about what Grunewald wanted?

A. Mr. Halperin went to see Mr. Grunewald and reported that he was prepared to accept $60,000 and we had a meeting with Mr. Tobias and Mr. Berman at the office of H. Merdinger & Company, 61 Broadway, and we continued the meeting at a restaurant, the Exchange Restaurant, I believe.

Q. What was said?

A. We told them that Mr. Halperin now could report that $60,000 would be acceptable, and they argued some more, and I think increased the amount to $40,000. There was some haggling back and forth, and we discussed the

matter of our own compensation. They asked us how much we wanted. We said a fee of $10,000. They said that was too high, that they would be prepared to pay $5,000, but that we could continue in the civil case and that we would be compensated for our work. We asked them how much, and they said we should leave it to them, meaning Tobias, Merdinger's office, and that they would be fair about it.

Q. Now, did you finally agree on a fee?

A. I think that—I don't know whether we did at that meeting, but Mr. Berman I believe phoned me and said it would be acceptable.

Q. Now, what did you do?

A. That the $60,000 would be acceptable; the figure we had named would be acceptable.

[fol. 325] Now, apart from the $60,000, did you agree on a fee for yourself?

A. $5,000.

Q. On the criminal case?

A. $5,000.

Q. And when was that to be paid?

A. After the case, after the criminal case had been disposed of, or after the threat of prosecution had been eliminated.

New York, March 1, 1955,
10:30 o'clock a.m.

Trial resumed.

ISIDORE DAVIS resumed the stand.

Direct Examination continued.

By Mr. MacMahon:

Q. Mr. Davis, when we left off last night we were discussing the $60,000 payment in the Gotham case and I think we reached the point where you said that Mr. Berman called you up and accepted the arrangement to pay the

$60,000 to you for the man in Washington. How was that money to be paid? What form?

A. Cash.

Q. And how was your $5,000 fee to be paid?

A. By check.

Q. Now, did you have any further talks with these clients in regard to the case in respect to these moneys?

A. Well, subsequently we told them, that is to say, Mr. Halperin and myself, that the money would have to be put up in escrow because the man in Washington preferred that it be put up in escrow with Mr. Halperin.

Q. Did you make such an arrangement?

A. We did.

Q. Tell us about that.

A. We discussed the matter of escrow with Mr. Tobias and Mr. Berman at a meeting at our office, and Mr. Tobias said that he would like to have somebody else act as [fol. 326] escrowee with Mr. Halperin. There was some discussion as to who that person might be, and Mr. Tobias suggested Mr. Greenstein, and then I communicated with Mr. Greenstein and asked him if he wished to do so and he was agreeable.

Q. Now, what were the terms of this escrow, and who was present when those terms were agreed upon?

A. Mr. Tobias, I believe, with Mr. Berman also, Mr. Halperin and myself.

Q. Now, what were the terms?

A. That the money was to be put up in escrow but not to be turned over until it was cleared that there would be no prosecution in the Gotham case.

Q. Now, did there come a time when you received the money?

A. Yes, sir. We received it in two instalments. The first instalment was $47,500.

Q. About when was this?

A. In the middle part of September.

Q. Who brought the money to you?

A. Mr. Tobias and Mr. Berman.

Q. Tell us about it.

A. Mr. Tobias and Mr. Berman came to the office and the money was in a brief case that was being carried by

Mr. Tobias. The money was counted by Mr. Tobias, myself, Mr. Halperin and perhaps Mr. Berman. After the money was counted and repackaged Mr. Greenstein who had been waiting in the anteroom was called in.

Q. Now, how much money was there?

A. $47,500.

Q. Continue.

A. And Mr. Halperin and Mr. Greenstein left to open the vault in the Trade Bank.

Q. Who had the money when they left your office?

A. I think it was Mr. Halperin who carried it.

Q. Did you have any talk with Halperin about the money after that?

A. There was a subsequent delivery of the balance of the money, $12,500, which I turned over to him.

Q. No. I am referring now to the $47,500.

A. Only that the vault had been opened and the money had been placed therein.

[fol. 327] Q. Who told you that?

A. Mr. Halperin and Mr. Greenstein also.

Q. Did he tell you what bank they put it in?

A. The Trade Bank.

Q. Was there any discussion about the eventuality of death of either of these escrow agents?

A. Well, that was the reason that Mr. Tobias gave——

Q. Was there a discussion?

A. There was, sir. I am sorry.

Q. Who had that discussion?

A. Mr. Tobias, Mr. Halperin, myself and Mr. Berman. I believe. The discussion was about the eventuality of death. Mr. Tobias I believe raised the point, and that is another reason why he wanted another escrowee, and Mr. Greenstein was suggested as the escrowee.

Q. Was there to be any arrangement as to the box with respect to that?

A. That it was to be opened in their names.

Q. How in their names?

A. In both of their names, in and/or.

Q. Did you receive any other money from anybody in connection with the Gotham case?

A. Mr. Berman delivered the balance of the money to

me about a week or ten days, I should think, after the first delivery of $47,500.

Q. How much was this balance?

A. The balance was $12,500.

Q. In what form was that received?

A. In currency.

Q. Who was present when it was delivered?

A. I think only myself. I don't know who else was in the office at the time.

Q. What did you do with it?

A. I turned it over to Mr. Halperin.

Q. Did he report to you?

A. That he put it into the box.

Q. Did you have any further talks with Mr. Kuehl?

A. During the next month, October 1948, Mr. Kuehl telephoned me and said that he had decided to close out the case on a no-prosecution basis but with fraud penalties and interest. I said thank you very much, and we hung up. [fol. 328] I reported this conversation to the people at the office, Mr. Schopick, Mr. Hoffman and Mr. Halperin, and I also telephoned Mr. Tobias and told him of the telephone call that I had received, and Mr. Tobias said that he would like very much to hear it himself. I asked him why. He said simply because he wanted to hear it himself, and asked me to arrange an appointment for him and with myself with Mr. Kuehl.

I called Mr. Kuehl and said that I would like to come to his office with the accountant for the taxpayer because the accountant for the taxpayer wanted to hear of this disposition himself. He said he saw no occasion for it, but I insisted, and so he said, "Well, then, come tomorrow," and we did.

Mr. Tobias and I went to Mr. Kuehl's office and Mr. Kuehl said the same thing he had said to me on the telephone, that he was closing out the case on a no-prosecution basis but with fraud penalties and interest.

Q. Did you have any communication with Mr. Greenstein after your talk with Kuehl?

A. Mr. Greenstein said to me that he had heard also from Mr. Tobias, and that Mr. Tobias said it was all right for him to release the money.

Q. What did you say?

A. I said, "Yes, I know."

Q. Did you have any talks with Halperin?

A. Only that he was going to take the money and deliver it to Washington.

Q. Did you hear further from Halperin in that connection?

A. When he came back he told me that he had; that he had given it to Mr. Grunewald.

Q. During this month of August, were there any transactions in the Pattullo case?

A. I believe that we introduced the clients in the Pattullo case to Mr. Halperin, and after I had told the clients that Mr. Halperin had come into the Pattullo Modes matter.

Q. Did you have a talk with Halperin about the Pattullo case prior to this?

A. Yes, I spoke to him during the month of July, after [fol. 329] my return from my vacation, and asked him since he was in the Gotham case, why wasn't he also in the Pattullo Modes case, and he said that he would talk with Mr. Grunewald, and I believe I testified to that yesterday.

Q. In August you introduced Halperin to your clients. Whom did you introduce him to?

A. Mr. Marks and Mrs. Segel.

Q. What did you say when you introduced Halperin to them?

A. I said to them that Mr. Halperin had a friend or an associate in Washington that promised to help in the case, and I think it would be fruitful, and that I thought we ought to have reason to expect that we would come out all right.

Q. Was Halperin present during this conversation?

A. Yes.

Q. Was anyone else present?

A. Mr. Hoffman I believe was present; perhaps Mr. Schopick.

Q. What did Halperin do after you had introduced him?

A. He went to see Mr. Grunewald after a while again, and there came a time when the question of what Grunewald wanted in the case was discussed.

Q. Discussed with whom?

A. Among ourselves, and then Mr. Halperin came back and said that he had talked the matter over with Mr. Grunewald, and Mr. Grunewald wanted a certain sum of money in the matter.

Q. Do you recall what that sum of money was?

A. $125,000.

Q. In what form was that sum of money to be?

A. In cash.

Q. Did you have a discussion with your clients about that?

A. Yes. We had them over to the office. Mr. Halperin and I and Mr. Hoffman told them what the associate in Washington wanted, and they said that it was high and they weren't in a position to furnish it, and couldn't it be reduced. We told them that we would try.

Q. Did anyone try?

A. Well, later on, Mr. Halperin and I had a discussion with Mr. Hoffman, and it was decided that I go with [fol. 330] Mr. Halperin to Washington to see Mr. Grunewald.

Q. When was this?

A. I think in the latter part of September or perhaps anywheres during the month of October of 1948.

Q. Who went and what did you do when you got there?

A. Mr. Halperin, Mr. Hoffman and myself went to Washington. Mr. Halperin went over to see Mr. Grunewald first and by appointment I came a little later. I met Mr. Halperin in the anteroom of the office in the suite in the Munsey Building in Washington, where Mr. Grunewald occupied a room, and he said that he was glad that he had a chance to talk to me first that Mr. Grunewald had agreed to accept $100,000. He says, "I want you to come in and meet him and it will be confirmed to you."

I went in and I was introduced, and after a minute's talk, Mr. Halperin turned to me and said, "Irving, in the Pattullo case Mr. Grunewald has agreed to accept $100,000."

Mr. Corbin: I didn't get that.

Q. Will you keep your voice up?

A. I said Mr. Halperin introduced me to Mr. Grunewald

and said that Mr. Grunewald had agreed in the Pattullo matter to accept $100,000.

Q. Was this person, Grunewald, present?

A. Yes, that is right. And I thanked Mr. Grunewald. I told him that the taxpayers were very lovely people, and after another few minutes of conversation having nothing whatever to do with the Pattullo case, Mr. Halperin and I left.

Q. What did Mr. Grunewald say when you thanked him?

A. "O.K., O.K."

Q. You say you all left. Where did you go?

A Back to New York.

* * * * * *

[fol. 381] Q. Now, did you have any conversation with Smith during the month of October, 1948?

A. During the month of October, 1948, Mr. Saver said that he had talked further with Mr. Baradell about the voluntary disclosure and that Mr. Baradell asked him to incorporate the details of the voluntary disclosure in an affidavit, and I had Mr. Smith come over to the office and dictated a preliminary affidavit which was subsequently taken down to Mr. Saver's office. I believe he was located at 37 Wall Street at the time. Mr. Smith and I both went to his office. We showed him the affidavit. He said that it was not quite complete enough or correct and that he would dictate another affidavit, which he did, and the affidavit that I had dictated was torn up.

Mr. Smith signed the affidavit.

Q. Now, what was your state of mind with respect to that affidavit?

A. I didn't believe that the affidavit was correct.

Q. You said you didn't believe it was correct?

A. Or truthful.

* * * * * *

Q. Now, during this month of October, 1948, did anything happen with respect to the money in the Pattullo case?

A. The client brought the money to the office.

Q. Now, you say the client. Who?

A. Mr. Marks, accompanied by Mr. Zipser who never entered the room. It was brought in a large envelope which was turned over to Mr. Halperin to put it in the vault.

Q. Did you have any communications from Mr. Saver?

A. Well, Mr. Saver phoned me and I saw him from time to time—mostly by telephone, I think. He said that Mr. Clayton was pressing him for the commencement of the audit and we would have to get started. I brought this to [fol. 332] the attention of Mr. Halperin and pointed out to him that the audit amounts to a complete revelation of all of the taxpayers' tax evasions and that we ought to know where we were going for sure, and he suggested that I speak with Mr. Saver and ask him to go to see Mr. Bolich, which I did, and Mr. Bolich went to see Mr. Saver—and Mr. Saver went to see Mr. Bolich in Washington and reported back to me that Mr. Bolich said to him that if the taxpayers cooperated fully and developed all of their income that he would recommend that the case be given a no-prosecution consideration.

Q. About when did you learn this from Saver?

A. In the early part of November, 1948.

Q. Now, did you talk with the taxpayers, your clients, after this?

A. I told them of this information that had come to me from Mr. Saver and said that we would now go ahead with the joint audit and they must be careful to divulge all of the income because that would be the basis upon which we would be given a no-prosecution consideration, and they said they would cooperate fully.

Q. Now, did there come a time when agents came on the premises of the Pattullo people to examine the books?

A. Yes, that is correct.

Q. And when was that?

A. In the middle part of November, 1948. Mr. Clayton and Mr. Scherm.

Q. Now, over how long a period did this audit of the Pattullo books take place?

A. During the months of November and December, 1948.

* * * * * *

Q. After the net worth statements were submitted did you have any further talk with Clayton?

A. Yes. Mr. Clayton said that as a further act of co operation on the taxpayers' part it would be necessary for them to sign certain affidavits, and asked that they be brought to the offices of the special agent at 253 Broadway.

Q. About when was this?

A. The first part of January, 1949.

[fol. 333] Q. Did you discuss that with the Pattullo people?

A. Yes, I did. I told them that that is what Mr. Clayton wanted to have done as essentially the last act of cooperation, and we went to the office, the special agents' office at 253 Broadway. Mr. Clayton interviewed the various stockholders and wrote out affidavits of confession of tax evasion in longhand, which each of them signed.

* * * * * *

Q. Now, did you have any further conversation with Clayton following the submission of these affidavits?

A. The next time I think I saw him was in Mr. Baradell's office on the 10th of January.

Q. Did you have any talks with him prior to that? You went to Mr. Baradell's office on the 10th of January. How did that come about?

A. Mr. Saver telephoned me and said that he had just gotten a call from Mr. Baradell and that I was to bring all the clients down forthwith to Mr. Baradell's office, which I did.

Q. Did you discuss that with your clients before you got there?

A. I told them that we had gotten this call and that I believed now perhaps we would be told that there would be no prosecution.

Q. Did you go down to Baradell's office?

A. We did.

Q. Do you recall the date of that?
A. January 10th.
Q. What year?
A. 1949.
Q. Now, who was present and what was said?
A. Mr. Saver, myself, Mr. Smith, Mr. Clayton, Mr. Scherm, Mr. Baradell, Mr. Marks, Mrs. Segel, Mr. Cohen and Mr. Zipser.
Q. Now, what did Saver say?
A. Mr. Saver said that the taxpayers had cooperated fully.
Q. Did he say anything before he said that?
A. I think that he had a memorandum of some kind prepared for this conference and talked about the fact that we had cooperated fully, and I believe made reference to the conversation that he had had with Mr. Bolich.
[fol. 334] Q. Now, what did he say about the conversation that he had with Mr. Bolich?
A. That Mr. Bolich—he pointed out to Mr. Baradell that Mr. Bolich had said if the taxpayers would cooperate fully in divulging all of their income, he, Mr. Bolich, would make a recommendation that the case be given a no-prosecution consideration, and then continued by saying that the taxpayers had in fact cooperated fully and had developed all of their income.

Mr. Baradell turned to Mr. Clayton and Mr. Scherm and asked them if that was so, and each of them confirmed the fact that we had cooperated fully, and Mr. Baradell finished the conference by saying that in view of the recommendation of no-prosecution consideration be given to the case, and because of the fact that the taxpayers had cooperated fully, that he was prepared to close out the case on a no-prosecution basis, that the taxpayers could consider themselves lucky, they shouldn't do it again.

Q. After your conference with Baradell did you report what had taken place to anyone?
A. To all of the men in the office, Mr. Hoffman, Mr. Schopick, Mr. Halperin.
Q. What did Halperin say about it?
A. He was pleased. We were all pleased, and we said,

"Well, all that was left to do now would be to turn the money over."

Q. Over to whom?

A. To Mr. Grunewald.

Q. What if anything did you do about the money after this?

A. We went to the Chemical Bank——

Q. Who is "We"?

A. Mr. Halperin, Mr. Schopick, Mr. Hoffman and myself went to the Chemical Bank at 46th Street and Madison Avenue. We went downstairs in the vault department. Mr. Halperin called for his vault. We were assigned to a rather large room. Each of us took a portion of the money and counted it. It was then reassembled and brought back to our office. Subsequently in the same day, it was put into one brief case and one traveling bag of some kind, and someone suggested that perhaps Mr. Halperin ought to have somebody accompany him. I think that I was asked and Mr. Schopick was asked and we declined to go. Mr. [fol. 335] Hoffman either volunteered to go or said he would go.

Q. What was the reason for that?

A. Other than the question of the large sum of money involved, safety purposes.

Q. When you counted it in the bank, how much was there?

A. $100,000.

Q. Did Hoffman and Halperin go to Washington?

A. They did.

Q. That same day?

A. That same day.

Q. About when was that?

A. Towards the afternoon or during the afternoon.

Q. Yes, but about when?

A. Around 3 or 4 o'clock in the afternoon.

Q. What month?

A. January 1949.

Q. About when in January?

A. About the 12th or 13th of January, the 14th.

Q. Did you have occasion to see Halperin after they had gone to Washington?

A. After he came back, he told us he had turned the money over to Grunewald.

Q. Did he say anything else?

A. Not that I remember.

Q. Did you have any conversations with Halperin about compensation for him?

A. Yes, he said that he wanted a further check. We had give him a check before for around $2,500.

(Government's Exhibits 39-A and 39-B marked for identification.)

Q. I show you, Mr. Davis, Government's Exhibits 39-A and 39-B. Can you tell us what they are (handing)?

A. Checks given to Mr. Halperin in the Pattullo case.

Q. For what?

A. For services rendered.

* * * * * * *

Q. Coming back to Pattullo, did you have any talks in January or February 1949 with Mr. Schwaeber?

A. I did or we did.

[fol. 336] Q. Tell us about them.

A. Mr. Schwaeber called and said that he would like to have the matter of his compensation finally finished with in the Pattullo Modes case, and Mr. Hoffman and I went to see Mr. Schwaeber at his office, and there Mr. Schwaeber said that he felt he was entitled to $25,000 for the work that he had done or his office had done in the Pattullo Modes case. We said we thought that that was too high, "How did you want it paid?" He says, "In cash." I says, "I think that is too high." Finally it was agreed for $20,000.

Q. Did you discuss that with your clients?

A. I did and told them that Mr. Schwaeber——

Q. Where did you discuss it?

A. At the offices of Pattullo Modes with Mr. Marks.

Q. Was anyone else present?

A. Mr. Hoffman I believe was present, and I told them of our conversation with Mr. Schwaeber and they said, "Well, why does he want that much money? He didn't do anything."

I says, "He thinks he did or he prefers to think that he did and this is why he wants this much."

The Court: Mr. Singer, you are not interrogating a witness. You are addressing a Judge.

Mr. Singer: I say to your Honor——

The Court: If you will act in a respectful manner, I will pass upon your objection, but I resent the type of action that you are now displaying.

Mr. Singer: May I say to your Honor——

The Court: Wait a minute.

Mr. Singer: I think your Honor should stop it when he does it. I can't stop it.

The Court: You can sit down, and you will be reached in your turn, Mr. Singer.

Mr. Singer: Very well.

The Court: Mr. MacMahon has made a point. Now, I am going to take up the objections as they come, but I will insist that they should be taken up in the proper manner in a court, and I think for any lawyer to get up and start interrogating a Judge is not the proper procedure in a courtroom.

Mr. Aranow: May I please——

The Court: Just one minute. Let me ask Mr. MacMahon. You are offering this as against Mr. Halperin?

Mr. MacMahon: Primarily.

The Court: Now, there is nothing in what has been said about the Clover Foundations or the Glovers which has any relevancy at all, as I see it, to Mr. Steinberg, Mr. Scherm or Mr. Bolich.

Mr. MacMahon: Your Honor, on that point, may the Government be heard?

The Court: Yes, surely.

Mr. MacMahon: Under the Witt case, there were some 14 different fixes involved.

The Court: That is right, I know. I have read that.

[fol. 356] Mr. MacMahon: The Court held there, the Second Circuit, that whether or not all of the people were involved in all of the fixes was immaterial so long as there was a ring which constituted one conspiracy.

The Court: Yes.

Mr. MacMahon: Now, the Government submits that under the theory and under the law of the Witt case, these documents are plainly admissible, as is the transaction with respect to the Clover Foundations.

The Court: What relevancy does it have—let me ask you—with reference to, let us say, Mr. Scherm?

Mr. MacMahon: Once he is in the conspiracy, he is presumed to continue in the conspiracy until and unless he withdraws and makes an affirmative withdrawal from that conspiracy, and there has been no evidence here that he has ever withdrawn from the conspiracy, and we submit, your Honor, that we have put him in the conspiracy, that he had his part to play, and that whether or not he played a part in this particular Clover case is of no materiality whatever. Nevertheless, he is bound by what went on there once he became a member of the conspiracy, knowing its purposes.

The Court: Well, I will accept these in evidence, but I will advise the jury that, in my opinion, these are simply evidence, documents, which have relationship to Mr. Halperin, as he was named as a power of attorney and apparently signed this withdrawal in this case; and in so far as Mr. Halperin, if they should find that he is a co-conspirator with Mr. Grunewald, why, then any statements of Mr. Halperin on that are binding also on Mr. Grunewald.

Mr. MacMahon: Your Honor, could the Government submit a memorandum of law on that?

The Court: You may, but I just advised the jury that at the present time there is nothing that I can see here in this [fol. 357] particular transaction that relates to Mr. Scherm, Mr. Steinberg or Mr. Bolich. It may be corroborative of certain other things, but I don't see that this particular transaction relates to any of them.

With that understanding, subject to what Mr. Singer has to say, I will receive them in evidence.

Now, what do you have to say?

Mr. Singer: I want to revert to the comment that I made before and ask your Honor to have Mr. MacMahon's comments made about somebody leading somebody around by the nose and superannuated old man—I don't remember the words—stricken from the record as not being part of any argument of law.

Mr. MacMahon: I will consent to the characterization——

The Court: Wait a minute. I will not strike them from the record because that was in explanation of why Mr.

MacMahon thought these documents were relevant, and I think it had reference to the statements that you made in your opening address to the jury.

Mr. Singer: I respectfully except to your Honor's ruling.

Secondly, I object to these documents upon the ground, one, that they are beyond the proven date of the alleged expiration of the conspiracy.

The Court: On that, may I ask you, Mr. Singer: What do you consider is the expiration date of the proven conspiracy?

Mr. Singer: I would say very, very clearly, as we have argued before many times, the date would at its very latest be January 10th or January 12, 1949, or whatever date it was that Mr. Baradell and these people met in the office of the special agent, where they were told that there was [fol. 358] no criminal prosecution in the Pattullo case; that anything beyond that, if at all, referred to some other conspiracy. My argument with respect to these exhibits is that they have nothing to do with the conspiracy alleged in the indictment and that, therefore——

The Court: Of course, you are assuming, Mr. Singer, that the conspiracy alleged in the indictment is restricted to Pattullo Modes or the Gotham Beef case.

Mr. Singer: I am making no such assumption.

The Court: Then I misunderstood you.

Mr. Singer: I am basing my motion upon the evidence in so far as it has been adduced at the trial and in so far as the indictment shows. I am drawing no other inference other than that which I feel can be drawn from the evidence and from the actual language of the indictment. Now that your Honor has brought it up, I didn't care to argue it in the presence of the jury, it is our claim and contention, I want to make clear at this point, so that the point of law can be clearly understood, that at best, giving all the evidence in this case——

The Court: All of it is not in yet.

Mr. Singer: Everything we have heard until now, if there were any conspiracy, there were more than one—there were at least eight or ten, and maybe seven, the statute of limitations had run because the last act that had to be done with respect to those particular matters expired

on the date when prosecution was declined or refused, and therefore on that basis and upon the basis that we urged in our motion preliminary to trial, that I don't want to repeat and take the time with now, I say that this is clearly objectionable.

And I go further, as long as we are on the subject, I say I am completely surprised at the story; I hadn't heard of [fol. 359] it, didn't know it existed. I am entitled to an opportunity to investigate the matter further for the purpose of defense so I may know how to deal with it.

The Court: You will certainly have an opportunity to discuss it with your client. He is the one referred to.

Motion for mistrial and denial thereof.

Mr. Singer: That may be your Honor's statement. I don't know. After all I would have to be the best judge as to whether I am surprised, and I say now upon all those grounds I object to it. I ask that all of the evidence be stricken out, and I further say in view of all this discussion, I ask for the withdrawal of a juror and the declaration of a mistrial.

The Court: The motions are denied.

Mr. Singer: I respectfully except.

Mr. Corbin: Your Honor, may——

The Court: Mr. Corbin is next.

Mr. MacMahon: Maybe I can save——

Mr. Corbin: I am going to make no speech, Judge.

The Court: I can't hear you.

Mr. Corbin: I am going to make no speech.

The Court: I appreciate that.

Mr. Corbin: Mr. Singer has, in my view, adequately covered the subject so far as the objections and motion are concerned, and I would appreciate it merely if my joining in such objections and motions should be noted.

The Court: It will be noted on the record and it is overruled. Same objection by all people and all have an exception. I would point out that the testimony is not all in, that we cannot determine what the conspiracy was, whether the conspiracy was finished until all the testimony is in. But I have noted, Mr. Rosenblum, that as far as I can see from any testimony relating to this Clover Foundation, that

[fol. 360] none of it so far seems to have any relevancy to Mr. Steinberg, Scherm, or Bolich.

* * * * * *

Q. Mr. Davis, during the year 1950, did you do anything with respect to the Pattullo Modes case?

A. I worked with Sher & Roder on the preparation of process to the 30-day letter that had been sent.

Q. What is a 30-day letter?

A. A letter from the Treasury Department offering the taxpayer an opportunity to protest the findings made with respect to a taxpayer's tax liability.

The Court: And stating that if they don't protest within 30 days the assessment——

The Witness: Will become final.

Q. Continue.

A. I worked with them and saw the protests when they were finally prepared and examined them.

Q. During what period of time was this?

A. Between the beginning of the year 1950 to about the middle part of 1950.

Q. Did there come a time when you heard anything with respect to Congressional Committees?

A. One day in June or July of 1951, Mr. Halperin came into the office and said that he had heard that a Congressional investigation was afoot, and that one of the cases that would be studied would be the Pattullo case, and that we had better get hold of the clients, which we did. We had Mr. Marks and Mrs. Segel come to the office, and we then told them that——

Q. Who was present?

A. Mr. Halperin and myself, Mr. Schopick.

Q. Give us that conversation.

A. We told them that we had information that there was a Congressional investigation afoot and that while we didn't know, there was the possibility that the Pattullo Modes case would be one of the cases that would be investigated; that they should under no circumstances speak [fol. 361] to anybody that comes to them, and that the only information they were to give would be their names and addresses, and if any other questions were put to them, they should refer the investigator to me or to us as counsel.

Q. Before you had the taxpayers in there, did you have any discussions among yourselves about calling in the taxpayers?

A. Yes, I said that we did.

Q. What were those discussions and who was present?

A. After Mr. Halperin gave me this information, I immediately telephoned to Mr. Schopick and had him and Hoffman come to the office. I repeated to them or Mr. Halperin repeated to them the information he had about the Congressional investigation being afoot, and we said that it was advisable and necessary that we immediately call in the clients to make sure they don't talk or say anything to anybody that might come around.

Q. Were Schopick and Hoffman out of the office at this time?

A. Yes.

Q. When had they left?

A. About March or April 1951.

Q. Was Halperin still in the office?

A. He was.

* * * * * *

Q. After you had this talk with Marks and Segel, did you hear from either one of them again in this respect?

A. I did, on August 15, 1951.

Q. What happened?

A. I received a telephone call from Mrs. Segel who told me that a Mr. Shapiro of the Congressional Committee had been in to see her. I immediately left my office and went to Pattullo Modes and saw Mrs. Segel in a room opening off the showroom.

Q. Now, tell us what happened there?

A. I said, "Tell me what happened."

She said a Mr. Shapiro, a Mr. Donald Shapiro, had come to the office, that she escorted him into the same room we were sitting in at the time and he said to her, "Tell me, how did you folks know that you were in tax difficulties?" [fol. 362] She said an agent had come around and said that he was in possession of information about off-the-record sales.

I said, "Well, don't you know that that negatives or

refutes the statement that had been made in an affidavit saying that you people had made a voluntary disclosure?"

And she said she didn't know, she was sorry.

I said, "But you were also told not to say anything."

"Well," she said, "I thought those questions were innocuous. I thought that would be the end of it."

I said, "Well, did he say he would be back?"

She said at the conclusion of her talk with him he had asked her to sign an affidavit or statement which she refused to do until she had an opportunity to consult counsel. I told her not to sign an affidavit, and on his return to tell him to get in touch with us.

Q. Now, did you have any talk with Halperin after you talked with Mrs. Segel?

A. I reported to him what had transpired, and I reported the same thing to Schopick and to Hoffman, what had transpired over at the office of Pattullo Modes.

Q. Now, can you state what the conversation, if any, was?

A. I said, hereafter, or, all of us said, after they had been given such explicit and sure instructions they went ahead and talked; we better get them into the hands of some lawyers.

Q. Was there any discussion about what lawyers?

A. We decided to go over and talk to Mr. Saver and to bring the client to him. I called them. They came—I called Mrs. Segel and Mr. Marks. They came to our office and Schopick and I, Mr. Schopick and myself, Mrs. Segel and Mr. Marks went to Mr. Saver's office at 60 East 42nd Street. There——

* * * * * * *

Q. Was Mr. Saver retained?

A. No. He refused to act for them, and I asked him to recommend somebody else, and he did.

Q. Whom did he recommend?

A. Mr. Kostelanetz.

[fol. 363] Q. Now, did you see anything more of Marks and Segel?

A. At the office of Kostelanetz from time to time after August 15th.

Q. What transpired there?

A. Mr. Saver met us at the office of Kostelanetz. He spoke with Mr. Kostelanetz for a short while before we were ushered in. We told Mr. Kostelanetz what had happened. We also described the tax case itself, what it involved, how it had been disposed of, and what the status of the case was at that time.

Q. Now, did you tell Mr. Kostelanetz anything about the moneys that had been paid?

A. No, we did not.

Q. Or about the man in Washington?

A. No, sir.

Q. Had you discussed that with your client before you went there?

A. I don't think so.

Q. Now, did there come a time when subpoenas were served on any of the Pattullo people?

A. Yes. There did come such a time. I was served, too.

Q. Can you recall which subpoena was served first, as to which one?

A. I can't recall. I can't recall for sure.

Q. Did there come a time when Smith was subpoenaed?

A. Yes.

Q. Do you recall about when that was?

A. Somewheres between August 15th and August 30th or perhaps a little earlier than the 15th.

Q. 1951?

A. 1951.

Q. Now, did you have any talk with Smith after the subpoena was served?

A. At the office of Kostelanetz he bemoaned his fate and I said, "Well, you have no other alternative but to stand by your affidavit." I said, "In the last analysis it was your word against Mr. Scherm's."

Q. Now, did you have any discussion with the other people in your own office about Mr. Smith?

A. I think after he was arrested.

Q. Before he testified?

A. We discussed among ourselves as to the extent of Mr. Smith's knowledge and I said to them that so far as I knew Mr. Smith knew nothing about cash.

[fol. 364] Q. Who was "we"?

A. Mr. Halperin, Mr. Schopick, Mr. Hoffman and myself.

Q. Now, did there come a time when you were subpoenaed?

A. Yes, sir.

Q. Did you have any discussion with anyone about that?

A. I don't remember any particular discussion.

Q. When were you subpoenaed?

A. Sometime prior to August 30, 1951.

Q. Did you discuss with anyone what your testimony would be?

A. I don't remember discussing it with anybody before.

Q. Did you appear before the Committee?

A. I appeared before counsel for the Committee.

Q. Did you testify?

A. I did, sir.

Q. Were you asked how you had met Mr. Smith?

A. I did.

Q. What did you say?

A. I said that I had met him at the office of Cohen & Feld, accountants with whom I discussed tax matters from time to time, but that wasn't the truth.

Q. What was the truth?

A. The truth was that I met Mr. Smith after we were in the case.

Q. Had you discussed before you testified the question of how you met Mr. Smith with anyone else?

A. With Mr. Schopick and Mr. Hoffman. Not with anybody else.

Q. And what did you say?

A. I said that I was going to say that we were retained through Mr. Smith whom I met at the office of Cohen & Feld.

Q. Now, were you asked at this appearance of yours before the counsel for the Committee what your state of mind was with respect to the Smith affidavit?

A. I said that I believed it, and that wasn't the truth.

Q. That you believed what?

A. I said that I believed the affidavit.

Q. And what was the—

A. The affidavit of voluntary disclosure of October 18th.

Q. And did you?

A. I did not.

[fol. 365] Q. Were you asked anything about Schwaeber & Saver?

A. Yes. I was asked how much money had been paid to them, and I said $3500.

"Was there anything else paid?"

I said, "No". That wasn't the truth.

Q. Now, did there come a time when Smith was arrested?

A. Yes.

Q. Do you recall about when that was?

A. On August 30th.

Q. Did you discuss that arrest with anyone and if so with whom?

A. With all the people in the office, Schopick, Mr. —that is, they were not at the office, but they came to the office; Mr. Halperin, Mr. Schopick and Mr. Hoffman.

Q. How did they happen to come to the office?

A. I called them to tell them what had transpired.

Q. What was the conversation and who was present?

A. This is following the arrest?

Q. Yes.

A. They were all present.

Q. Who were they all?

A. Mr. Schopick and Mr. Hoffman and Mr. Halperin.

Q. All right.

A. We discussed the Smith arrest and one of us said, "I wonder what impact this will have on the clients themselves. Will they now be inclined to talk?" And one of us —I don't remember who—said we didn't think they would even in the face of the arrest.

Q. Did you have any discussion with Marks and Segel about Smith's arrest?

A. I did.

Q. When was that?

A. Shortly after the arrest.

Q. What was said?

A. They said that Mr. Smith had certainly extended himself for them, that they hadn't known about the fact that he signed this affidavit, and they were wondering what would happen to him, and I said that I didn't think any-

thing was going to happen to him, that the arrest was a pressure move to get the rest of us to talk.

Q. What did you say about talking?

A. They said they wouldn't—I don't understand that question.

[fol. 366] Q. Was anything said about the rest of you talking?

A. At the offices of Kostelanetz, they said they were going to refuse to answer on constitutional grounds.

Q. And you knew that?

A. And I knew that.

Q. Had you reported that to anyone else?

A. To Mr. Schopick, Mr. Halperin and Mr. Hoffman.

Q. Had there been any discussion about the attorney-client privilege?

A. With Mr. Smith. I said to Mr. Smith and to Mr. Kostelanetz that I thought it would be possible for Mr. Smith to claim an attorney-client relationship because we had engaged him to assist Weisberg & Greenstein in the making of the audit; that we had paid him moneys in connection with it, and that we thought that he could plead that privilege.

Mr. Kostelanetz agreed, seemed to agree.

Q. Was anything said about what was to happen if the Committee didn't go along with this position of attorney-client?

A. Mr. Smith had said before to me that he was going to stand by his affidavit.

Q. Did there come a time when you learned about a grand jury investigation in the Eastern District of New York?

A. Yes, I did.

Q. When was that?

A. In February of 1952.

Q. Did you have any discussions with anyone about that?

A. Discussed it with Mr. Halperin, Mr. Schopick and Mr. Hoffman.

Q. What were those discussions?

A. We read that the Government was impaneling grand juries throughout the country, and that a grand jury was being impaneled in Brooklyn, New York, and we talked

among ourselves as to the extent of the jurisdiction of the grand jury of Brooklyn, that it would not be in a position to find any indictments because there was no act committed in the Eastern District.

Q. Did you say anything with respect to what the clients would or wouldn't do if called before that grand jury?

[fol. 367] A. All of us felt that the clients would not talk and would plead their constitutional privilege.

Q. Anything about Smith?

A. We didn't think that Smith would testify. He had already been arrested.

Q. Did there come a time when you met a man named Meehan?

A. Yes, there came such a time.

Q. Would you tell me how you met him?

A. Mr. Meehan was associated with some other agents in examining our books, and he came in one day and asked about a particular $500-check that had been given to Mr. Deutsch by Mr. Smith and Mr. Schopick and I talked about it, and Mr. Schopick said that he would go over and find out how the $500-check was treated on the books of Smith and his partner, and that the explanation for the giving of that $500-check would be that Mr. Hoffman selected those means of making a loan to his brother-in-law.

Q. Did Schopick go and make such a suggestion to Smith?

A. Yes, he did.

Q. Was that the fact?

A. That was not a fact.

Q. Did you have any discussion with respect to Mr. Grunewald and this grand jury with anyone?

A. Not during the month of February.

Q. Did you at any later time?

A. During the month of March, when we were before the grand jury or subpoenaed to appear before the grand jury, Mr. Halperin said that he was in New York.

The Court: Said who was in New York?

The Witness: That Mr. Grunewald was in New York; he knew that he was in New York.

Q. What was said?

A. He said he would try to see him, but I don't know that he ever did.

Q. Try to see him about what?

A. Just about the case. There was no particular discussion as to what he wanted to see him about.

[fol. 368] Q. Did you see any more of Marks or Segel around the time of this Brooklyn Grand Jury?

A. We saw them before they appeared before the grand jury in March.

Q. Who is "we" and what was said?

A. I had been in communication right along with Marks and Segel mostly at Mr. Kostelanetz's office, and I heard that a meeting was to be held in the home of Marjorie Segel in Westchester on a Sunday early in March of 1952. When I got this information, I asked Mr. Marks whether he wanted me present. I said, "I assume you want me present." He said, "Well, you had better talk to Mr. Kostelanetz about it." And I did, and he said, "Call me tomorrow," at his home, which I did. He said "You had better let me handle this meeting myself. You better not show up."

I immediately told Mr. Halperin and Mr. Hoffman and Mr. Schopick about that fact and said to them that I felt that they were going their own way, their separate ways.

Q. What did they say?

A. They said that I should nevertheless try to communicate with Mr. Marks; and the following day, on a Monday, I believe, I called Mr. Marks and wasn't able to speak to him immediately, but I finally did get him, and he consented to see me, and Mr. Schopick and I went over to the office of Pattullo Modes and there we saw Mr. Marks, and said, "How did it happen that you had this meeting without me?"

He says, "We have decided to cooperate with the Government."

I says, "Does that mean that you are going to testify?"

So he says, "Draw your own conclusions."

I said, "After all the help that we gave to you in this case, would you do us one favor? Would you at least consult other lawyers of your own choosing?", that we were sure that it was in their best interests to get another opinion. He said that that sounded reasonable, that he would talk the matter over with his associates and let us know. He never did.

[fol. 369] The Court: When was that? Can you fix the date of that approximately?

The Witness: About March 8th, 9th, somewhere around there.

The Court: 19——

The Witness: 1952.

Q. On the way over there, did you and Schopick have any discussion about what you would say when you got there?

A. We said that we should be very careful in anything we say to Mr. Marks because we felt that they were going their separate ways and anything we said at this time would be reported to the grand jury.

Q. Did there come a time when you were subpoenaed before the Brooklyn Grand Jury?

A. Yes.

Q. And who else was subpoenaed?

A. Mr. Halperin, Mr. Schopick and Mr. Hoffman.

Q. Do you know whether Mr. Deutsch was subpoenaed?

A. Yes.

Q. Did you have any conversations among yourselves with respect to those subpoenas?

A. That we would all plead our constitutional privilege.

The Court: Was that agreed between you all?

The Witness: Each of us said that they would. Each of us said that he would.

Q. At a meeting you had?

A. That is right.

Q. Going back to the original Congressional investigation, did you have any talks at or about that time concerning Mr. Grunewald?

Mr. Aranow: With whom and where?

Mr. MacMahon: Anywhere.

A. We did. We asked Mr. Halperin wasn't there anything that Mr. Grunewald could help in and why doesn't he go to see him. He said he would not go to see him, that he [fol. 370] was sure that Mr. Grunewald knows about it, and that if he was in a position to help that he would.

Q. Did you have any talk with the Gotham people?

A. In March of 1952.

Q. What was that talk?

A. After a certain hypothetical statement was given by our counsel at the time——.

Mr. Singer: I object to that.

Q. Just confine yourself to the talks with your clients and facts.

The Court: Yes. Where did you meet?

The Witness: At the offices of H. Merdinger & Company, and I met Mr. Tobias, and I am not sure whether I met Mr. Berman. I said to Mr. Tobias that we were contemplating cooperating with the Government, that in order to tell about one case that we had to tell about the Gotham Beef Company case, and that I wanted him to know about it. So they said, "Well, we paid fees and that is the position we take."

I said that I didn't know yet finally what our position was going to be, and until that was determined, if they are questioned, it would seem to me they should also plead their constitutional privilege.

Q. Had you had any talks with Halperin about that?

A. I told him I had been down to see Mr. Tobias.

Q. What did Halperin say?

A. Nothing that I remember. That is to say, I am not sure that I told Mr. Halperin anything about it at this time, but I did tell him at a subsequent time that I had been to see Mr. Tobias.

Q. When was that?

A. Because during the month of March Mr. Halperin had engaged another lawyer and I was not on speaking terms with him for a short while. When I talked to him about my having gone to see Mr. Tobias?

[fol. 371] Q. Yes.

A. A month or two months or three months after the event took place, during the course of a conversation, I recalled to him that I had gone to see Mr. Tobias.

Q. What was that conversation with respect to?

A. Only that I had gone to see Mr. Tobias during the month of March and told him we were then contemplating cooperating with the Government, and that in order to talk about one case, we had to talk about the other.

Q. Did Mr. Halperin say anything to you about what you should do?

A. Well, I asked him to cooperate. He says, "You do what you like." He says as far as he is concerned, "The Government hasn't got a case against us," and he wasn't going to cooperate.

Q. Was the name Grunewald mentioned in any of those conferences?

A. I don't remember.

Q. Do you have counsel? Do you have a lawyer of your own?

A. Yes, I do.

Q. What is his name?

A. Judge Sol Gelb.

Q. Have you related the facts to which you have testified in this case to him?

A. Yes, I have.

Q. Were you indicted for conspiracy to defraud the United States growing out of the transactions to which you have just testified?

A. Yes.

Q. What did you do with respect to that indictment?

A. I pleaded guilty to one of the counts of the indictment.

Q. The count having to do with the conspiracy?

A. Yes, sir.

Q. Were any promises made to you by any United States Attorney or anyone on behalf of the Government?

A. No, sir.

Q. Have you yet been sentenced?

A. I have not.

Mr. MacMahon: Your witness.

The Court: Let me ask one question about this count in the indictment.

Who were named as co-conspirators in the indictment to which this witness has pleaded guilty? Probably there is no dispute about it. It is a matter of record. I just [fol. 372] wanted to know whether any of the people now on trial were named in that indictment, too.

Mr. MacMahon: Yes.

The Court: All of them?

Q. Did they agree to pay it?

A. Yes, they agreed.

Q. Did you thereafter receive any money from them?

A. At the offices of Pattullo Modes I received a box supposedly containing the $20,000.

Q. Who gave that to you?

A. Mr. Marks.

Q. Did you open it?

A. No, I did not.

Q. Did you have any conversation with Marks at the time he delivered it to you?

A. He said, "This is it."

Q. What did you do with it?

A. Brought it back to the office and turned it over to Mr. Hoffman, who was to deliver it to Mr. Schwaeber, who was coming to our office that same day.

Q. Did Mr. Schwaeber come?

A. I believe that he did. I am sure that he did.

Q. Did you have any conversation with Hoffman about it?

A. He told me he had turned it over to Mr. Schwaeber.

[fol. 337] Q. Continuing now with the Pattullo case did you have any other conference with anyone with respect to the money?

A. Mr. Hoffman told me somewheres in the month of February, March or April, 1949, that he was going to meet with Mr. Steinberg, he was going to pick him up at the offices of the revenue agents' office at 341 Ninth Avenue, and that perhaps he would have dinner with him and asked me to come along. I at first refused to go, declined to go, but I went with him, and we picked up Mr. Steinberg at 341 Ninth Avenue and from there drove to his home on West End Avenue. Mr. Hoffman and Mr. Steinberg were seated in the front and I was seated in the back. Then when we got to his home we went upstairs and I think we had a drink, and they talked a good deal about some projection machine that was in the room off the anteroom or vestibule; it looked very much like a den, and after a while Mr. Hoffman said, "Well, come on" to me, and I

went with him. I said, "What did you want me for? What was this discussion about?"

He said, "Well, you know, I wanted to find out from Steinberg what he wanted in the Pattullo case." He said, "You know, he expects to be taken care of."

I said, "What did he say?"

He said, "Settle it with the agent."

And sometime after that Mr. Hoffman told me that Mr. Scherm was coming to the office in connection with the Pattullo case and that what he wanted was going to be settled. Mr. Scherm came to the office and Mr. Hoffman spoke with him for a little while and came out and said that he is asking for an impossible amount. He said, "You better come in."

I went in, and we spoke a little while about the Pattullo case generally. I said, "What is it you want?"

He said, "I think we are entitled to $50,000."

I said, "What for?"

He said, "Well, I think we were of help."

I said, "How did you help?"

[fol. 338] And then he proceeded to point to various items.

Q. Could you tell us some of those items?

A. One—two I remember mostly were traveling and entertainment. He said if he had—he was proposing certain disallowances, but if he increased those disallowances in any amount at all, it would be in excess of the $50,000 considering excess profits taxes, penalties and interest.

Q. What did he say about your claimed allowances for travel and entertainment?

A. Why, he recited the amounts claimed as travel and entertainment deductions in the tax return and said that there was no substantiation or very little substantiation; that if he was disposed to, he could easily disallow more than he was proposing to disallow, and that if he increased these disallowances, the taxes, penalty and interest would be in excess alone of the amount that he was asking for. He said also that he was helping us with the accruals that were being set up.

Q. What were those accruals?

A. There were several accruals. There was an accrual that was set up because of an error that had been made in

the computation of the amount to which Jo Copeland was entitled to under the contract; her share in the profits in the firm was computed after corporate taxes; whereas in accordance with the contract that should have been computed before Government taxes, before taxes of any kind; and also salary increases had been given to the other stock holders of the corporation in excess of the amounts which were prevalent at the time that these contracts were entered into, and an accrual should be set up for that reason; also, accruals with respect to the off-the-record sales that Jo Copeland would be entitled to as her share of the profits.

Q. Let me see if I understand. What does accrual mean? A debt?

A. No. A reserve. Something in the nature of a reserve against a particular liability.

Q. And the liability here was to Jo Copeland, is that it?

A. The liability was to Jo Copeland.

Q. What had Scherm done with respect to that, taxwise?

A. Well, we had contended for all of these accruals and it [fol. 339] appeared as if we were going to get them. We were entitled to have these accruals.

Q. As what?

A. As deductions against the amount that would be owing by the corporation for taxes.

Q. What did Scherm say he had done with respect to them?

A. He said he had been of help to us. I said that he hadn't been of help to us; we were entitled to those accruals because with respect to the salary accrual and with respect to the error in computation with respect to Jo Copeland's share being computed after taxes, that clearly under the contract between Pattullo Modes and Jo Copeland, the corporation was indebted to Jo Copeland in those amounts and that certainly she was also to share in the off-the-record sales since those moneys represented profits to the company, and she was supposed to share on an accrued basis in those amounts, too; that we were therefore entitled to those accruals.

Q. What did Scherm say?

A. Well, he said he had helped, but never was able to point out to me how he had helped precisely.

Q. Were you satisfied with what he had done on the travel and entertainment?

A. I think he could have proposed—I think he could have disallowed more because of lack of substantiation.

Q. How much more?

A. I can't say, Mr. MacMahon.

The Court: Did the taxpayer file the returns on an accrual basis?

The Witness: Yes.

The Court: Not a cash basis?

The Witness: No.

The Court: Therefore anything which was an accrued debt of the company in the taxable year would be a deduction against their income even though they hadn't paid it out.

The Witness: That is correct.

[fol. 340] Q. What did you conclude in this conversation with Scherm?

A. He reduced the amount to 45 and finally to 40 thousand.

Q. In what form was this payment to be?

A. In cash. It was paid in cash.

. . . . . .

The Court: Then what did you do? What was the conversation after that?

The Witness: I spoke to him, I said, "Well, what is the lowest you will take?"

He said, "$45,000." He said, "It is not all for me."

I said I didn't care who it is for, it has got to be less, and he agreed to accept $40,000.

Q. What was the last part?

A. And he agreed to accept $40,000.

Q. Now, did you discuss this with your client?

A. I did.

Q. Whom did you discuss it with and when and what did you tell him?

A. With Marks and with Mrs. Segel, I think; I am not sure about Mrs. Segel. I told Mr. Marks precisely what happened. I explained to them the demands that were being made and the reasons for it and the respects in which

Mr. Scherm claims he was of help. I also told them that I didn't think, or told Mr. Marks that I didn't think he had helped us in the respects that he related, but that is what he wants and perhaps we ought to get through with it and finish with it.

They said, "It is an awful lot of money, but if this finishes it, maybe we should pay it," and it was paid.

The Court: Did you say it was paid?

The Witness: Yes.

The Court: All right.

Q. You say it was paid? Who paid it and under what circumstances?

A. Mr. Marks brought the money to our office. He [fol. 341] handed it to me and Mr. Hoffman. He handed it to me and Mr. Hoffman. He brought it in a red manila envelope.

Q. About when did this happen?

A. In about March or April 1949. The money was placed on a soft chair in the middle room of our suite, a room once occupied by Allan Hynian. Mr. Scherm came to our office. He came into this room. I said, "There it is for you." He took the envelope, put it in his briefcase and walked out.

The Court: Do you know what was in the envelope?

The Witness: I didn't count it. I saw it was currency.

The Court: Are those the only times Scherm was in your office?

The Witness: No. He was there on other occasions.

The Court: On other occasions?

The Witness: Not many; in connection with the Pattullo case.

* * * * * * *

Q. In 1949, was there anything that you did in the Gotham case?

A. Yes, after the case was returned to the revenue agents' office in Brooklyn, I had one or more meetings with Mr. Tobias and some other man in his office, and worked on some of the legal aspects of the Gotham case, wrote him a letter and also wrote a memorandum of law.

Q. Did you have any conferences with respect to him?

A. Had a conference in the revenue agents' office in Brooklyn.

Q. When was that?

A. In 1949; I think the first half of 1949.

Q. That was in connection with the civil aspects of the case?

A. That is correct, sir.

Q. Did you have any further talks with Mr. Halperin in the Pattullo matter?

A. Towards the end of the year 1949, I told Mr. Halperin that there was a feature of the Pattullo Modes case that [fol. 342] suggested the possibility of further tax saving. I said that there was a case which had been decided in the midwest that had gone against the Government, and that the Government was postponing prosecuting its appeal, and that if by any chance the Government had decided to abide by the decision, that would be of considerable moment in the Pattullo Modes case, and asked him if he could arrange an appointment with some important official in the Treasury Department so that we could find out from them if by any chance the Government has already decided to go along with this particular decision.

He said that he would call Mr. Grunewald and see if such an appointment could be arranged. An appointment was arranged for the first part of January, 1950. Mr. Halperin and I went to the Treasury Department and saw Mr. Oliphant. I described the purpose of our visit——

The Court: Who was Mr. Oliphant and what was his position?

The Witness: The chief counsel of the Treasury Department. I briefly described the reason for our visit and asked him whether or not the Government had already finally taken a position in connection with that legal principle, and he called in somebody else, and then we saw yet somebody else and they said that they didn't know and it didn't appear as if any final decision had been taken.

Q. Did there come a time when you had some discussion about a case known as Clover Foundations?

A. Yes.

Q. Would you tell us when that was and how that matter came to your attention?

A. In the middle of 1950, in the month of June, 1950, Mr. Hoffman said that he had been talked to about the Clover Foundations, that it was a very large case, that the indicated tax evasion was——

Mr. Singer: I object to anything to do with this matter as not being within the issues of this indictment.

[fol. 343] The Court: In what respect?

Mr. Singer: There is no allegation concerning it in the indictment. No information or knowledge has come to any of the counsel for the defendants about it. We are entirely surprised at any matter other than these two——

The Court: I don't know what this is about, but it seems to me it is within the general scope of the indictment so far.

Mr. Singer: We object to it on the ground that it is incompetent, irrelevant and immaterial and not binding on the defendants.

The Court: If it is irrelevant, we will strike it out.

Mr. Rosenblum: I object to it because we have this same old problem of the jury having heard something they shouldn't hear. That is my point about striking it out later on.

I make a further objection that it appears now that the witness has reached a point where it is quite clear the conspiracy is over.

The Court: What conspiracy?

Mr. Rosenblum: The one that they allege in the indictment.

He is talking about going to see Oliphant in Washington now. What has that got to do with the so-called conspiracy? I move to strike all that testimony from the record.

The Court: There is nothing in this indictment, so far as I can see, which limits the indictment to Gotham Beef or Pattullo Modes. It is an indictment which relates to certain conspirators being engaged in a conspiracy to defraud the United States in the exercise of its governmental functions of administering and prosecuting violations of the Internal Revenue laws.

Mr. Rosenblum: I still don't get the significance of it.

The Court: I don't get the significance of it.

[fol. 344] Mr. Rosenblum: Except we are putting in mat-

ters now which don't have any significance. We have heard about every one named in the indictment——

The Court: When a trial starts, nobody knows what the significance of it is.

Mr. Rosenblum: We should know so we know what to meet. We should be told so that we know what to meet.

The Court: We will find out what the significance of it is, if anything.

Mr. Rosenblum: I renew my motion to strike out the testimony concerning Mr. Oliphant. I don't know whether he is supposed to be a defendant or is going to be a defendant. In that entire line I see no relevance to this case.

The Court: Objection overruled.

Mr. Rosenblum: I except. And I make a similar motion in respect to the testimony about Clover.

The Court: Same ruling.

Mr. Rosenblum: Exception.

Mr. MacMahon: May I have the last question read?

(The reporter read back the following:

"Q. Would you tell us when that was and how that matter came to your attention?

"A. In the middle of 1950, in the month of June, 1950, Mr. Hoffman said that he had been talked to about the Clover Foundations, that it was a very large case, that the indicated tax evasion was——")

The Court: Go ahead.

The Witness: —in the neighborhood of three-quarters of a million or perhaps a million dollars, and that the clients would come to the office.

The Court: Did he say who had talked to him about this matter?

The Witness: I don't remember.

[fol. 345] By Mr. MacMahon:

Q. Go ahead.

A. The clients did come. That is to say, a husband and wife, Mr. and Mrs. Glover. Mr. Hoffman was present——

Mr. Singer: Could we get that name?

Mr. MacMahon: Glover.

The Court: Is it a C or G?

The Witness: It is Clover Foundation and Glover is the name of the people or vice versa. I think it was Glover.

Q. We will straighten your recollection out on that with documents in a moment. Go ahead.

A. They came to the office and spoke to us briefly about the details of the case. They said that they had engaged in large-sized real estate transactions with a lawyer, who had defrauded them, and that in an effort to recoup some of their losses, the matter had come to the attention of the authorities and that they were now in tax difficulties.

I asked them how these tax evasions had occurred, and they said that they had made off-the-record sales and they had done other things, which I don't remember. I had never——

Q. What was the business of this Foundation?

A. Manufacturers of ladies' undergarments.

Q. Did you discuss that with anyone else?

A. Mr. Halperin was either present at the conversation or I told him immediately about it, told him about the nature of the case, and either on that occasion or shortly thereafter we said to the Glover people that they would have to pay a substantial sum of money; that there was a person in Washington whom we had used in other cases, and that we would expect to go to him with this case.

Q. Did you tell them what the form of the money would be?

A. We said that it would have to be in cash, but there was nothing said about the amount at this time, and that it would have to be substantial.

[fol. 346] Q. Did you find out where the case was in the Internal Revenue Bureau?

A. Special agent's office.

Q. Where?

A. New York.

Q. What if anything did Halperin say about it?

A. We had a meeting at Mr. Greenberg's office, the accountant for the taxpayers.

Q. Who is "we" and what was said?

A. Mr. Halperin——

Mr. Rosenblum: Do I have a continuing objection to the entire line as to this entire incident being referred to now?

Mr. Singer: All counsel——

Mr. Rosenblum: Co-counsel tell me all have an objection.

The Court: What is your objection?

Mr. Rosenblum: That it is not relevant, that it is not competent, that it is not binding on these defendants; that it is hearsay so far as they are concerned, and certainly not within the issues we are facing now.

Mr. Aranow: And we did demand a bill of particulars, if your Honor pleases, and on the assurances that there would be nothing outside the indictment brought in, at that time no bill of particulars was given us.

The Court: I have read the record on that argument. I don't quite agree that that was the determination there, but I will take this subject to connection. I don't know what the connection is.

Mr. Rosenblum: I don't think the record shows there was an assurance. However, Judge Walsh did say if other matters are brought in, it will then be for the Court who is hearing the case to decide what opportunity we should have to prepare, and, as I say now, we know nothing about this case.

[fol. 347] The Court: Neither do I. I don't know any more than you do about it. Now, we will find out what it is all about. I don't know if it has any relevancy to the defendants here or any of them.

Mr. MacMahon: He has already mentioned the defendant Halperin in connection with this case. I submit it is plainly relevant. He has already mentioned the man in Washington, who has been identified as Grunewald in the past.

The Court: If Mr. Rosenblum were to confine his objection to his own client, maybe I would have something more to do.

Mr. Rosenblum: I am making my objection in behalf of my client.

The Court: You made it in behalf of all defendants.

Mr. Rosenblum: No, I said I objected in behalf of my client, but the counsel said they also objected and so I brought it to your Honor's attention. I am only interested in my client and no one else in this trial.

The Court: I have noticed your objections don't point that up as much as might be helpful.

Mr. Rosenblum: I don't think your Honor should say that because it is clear I am objecting only in behalf of my client.

The Court: As to your client, I will say I haven't yet seen anything in this testimony that relates to Mr. Steinberg.

Mr. MacMahon: Before your Honor makes such a ruling, may I call your attention to the Witt case, which I now hand you, in this Circuit (handing to Court).

Mr. Rosenblum: May we have a copy, if your Honor pleases?

Mr. MacMahon: It is a published opinion.

[fol. 348] Mr. Rosenblum: We have asked for all these things in advance.

The Court: You don't ask for citations of opinions in advance.

I will read it. Also read the June, 1954, issue of the Michigan Law Review on hearsay and conspiracy cases. It will be very helpful to you. Go ahead. Next question.

Mr. Gottesman: May I be heard for just a moment?

The Court: No.

Mr. Gottesman: Your Honor specifically said that your ruling was as to the objection in behalf of Steinberg and you were not considering the others. Therefore, I must make the same objection in behalf of my client Scherm.

The Court: You say there is nothing so far that relates to Scherm?

Mr. Gottesman: Yes.

The Court: I so indicate. Whether there will be in the future, I don't know.

Let us go ahead.

Mr. Aranow: I make the same objection on behalf of my client.

The Court: Same ruling.

Mr. MacMahon: May I have the last question read?

(The reporter read back the following:

"Q. Who is 'we' and what was said?

A. Mr. Halperin——")

The Witness: Mr. Halperin and myself and Mr. Hoffman met with Mr. Greenberg, the accountant for the taxpayers,

as well as with Mr. and Mrs. Glover in the office of Greenberg on lower Broadway. The conversation there dealt [fol. 342] principally or exclusively with the accounting features of the case and towards—that is all I remember as to what happened at Greenberg's office.

Q. Was there any mention of cash at that meeting?

A. At the tail end; I am not sure that Mr. Greenberg was present.

Q. Were you retained by the Glover people?

A. Well, we were given a check for $2,500.

(Government's Exhibit 44 marked for identification.)

Q. I show you Government's Exhibit 44 for identification and ask you if that is the check to which you just referred (handing).

Mr. Singer: I object to it upon the ground it is incompetent, irrelevant, immaterial, and not within the issues of this indictment.

Mr. Aranow: Same objection here.

Mr. Gottesman: Same objection.

Mr. Rosenblum: I object in behalf of my client, Steinberg, that it is not binding on him in any regard.

The Court: That will be a matter, if taken at all, subject to connection.

Mr. Rosenblum: I except in behalf of Mr. Steinberg.

The Court: Nothing so far said relates to Mr. Steinberg or Mr. Scherm.

Mr. Aranow: Or Mr. Bolich.

The Court: Or Mr. Bolich so far.

Mr. MacMahon: Will you read the question?

(Question read.)

A. Yes, it is.

[fol. 350] Mr. MacMahon: I offer it in evidence.

The Court: Let me look at it.

Any objection?

Mr. Rosenblum: I renew my objection in behalf of the defendant Steinberg.

Mr. Gottesman: I make the same objection in behalf of the defendant Scherm.

Mr. Singer: May I see it so that I can make an objection?

The Court: You objected.

Mr. Singer: I objected when he showed it to him, but I want to see it now so that I can make a proper objection.

The Court: All right, it is being shown to you.

Mr. Singer: That is right.

It turns out it is a "C" and not a "G", the Clover Foundations.

Now, I object to it upon the ground it has nothing whatever to do with the issues of this matter. It is not binding on my client. It is incompetent, irrelevant and immaterial.

The Court: Objection overruled. You may have an exception. It is admitted in evidence subject to connection.

Mr. Singer: I respectfully except.

(Government's Exhibit 44 for identification received in evidence.)

Mr. Corbin: May I have the same objection, your Honor?

The Court: Yes, everybody has the same objection.

Mr. Rosenblum: And now you are lumping us together.

The Court: All I was suggesting before, Mr. Rosenblum, was that maybe you and Mr. Gottesman had a [fol. 351] special objection on behalf of your clients that the others didn't have, that you weren't taking advantage of it, but I have advised the jury on that point, so we now take it subject to connection.

Mr. MacMahon: May I read this to the jury?

The Court: Yes.

(Mr. MacMahon read Government's Exhibit 44 to the jury.)

By Mr. MacMahon:

Q. Did you have any further meetings with the Glovers in this connection?

A. It was agreed that Mr. Halperin should go to Washington for the purpose of finding out whether or not Mr. Grunewald could handle the matter for us and how much he would want. After Mr. Halperin came back and said that Mr. Grunewald wanted something in the neighborhood of $175,000 or $200,000, we reported that information to the clients and they said that it was utterly and completely out of the question, and they weren't prepared to pay it.

There was some further discussion, I think another trip was made, and there was a reduction in the amount demanded, and they finally said that if we were agreeable to accept $100,000 for everything including our fees, that that might be all right. We said that we could not make such an arrangement and the check was returned, and we withdrew from the case.

. . . . . .

Q. I show you Government's Exhibits 45 for identification and 46 for identification and ask you if you can identify them (handing).

A. These are powers of attorney——

Mr. Singer: May I ask that his answer be limited to yes or no.

Q. Can you identify them?

A. Yes, I can.

Q. And what are they?

[fol. 352] Mr. Singer: I object to it upon the ground it is incompetent, irrelevant and immaterial and not within the issues of this indictment.

The Court: Objection overruled. You may have exception.

Mr. Singer: Exception.

The Court: What are they?

The Witness: Powers of attorney made out in favor of myself, Max Halperin and Samuel Schopick by Minnie Glover in one instance and Julius Glover in another instance.

(Government's Exhibit 47 marked for identification.)

Q. I show you Government's Exhibit 47 and ask you if you can identify that (handing). Yes or no.

A. Yes.

Q. What is it?

Mr. Singer: I object to it upon the grounds I have urged as to the previous exhibit.

Mr. Aranow: I object on the further ground that it calls for the contents of a paper which is not in evidence and is merely——

The Court: Mr. Singer's objection is overruled. Yours is sustained.

Mr. Aranow: Thank you.

Q. From whom did you receive the document?
A. From whom?
Q. Yes.
The Court: It is executed?
The Witness: It is executed by me.
The Court: If you want to offer it, show it——
Q. What did you do with the document?
A. Filed it together with the powers of attorney.
Q. Where did you file it?
A. In the special agents' office.

[fol. 353] Mr. MacMahon: I offer it.

Mr. Singer: Objected to on the grounds urged previously.

Q. I ask you if you can identify the signatures at the bottom of the document (handing).
A. I can.
Q. Whose are they?
A. Samuel Schopick and Max Halperin.
Q. And your own?
A. And my own.
The Court: Let me look at the paper.

Did I understand the witness to say that the powers of attorney and this other statement relative to fees, which is Government's Exhibit 47 for identification, were filed in the special agents' office?

The Witness: Yes, that is correct.

The Court: Are these the originals that were filed, do you know?

The Witness: It looks like they are.

Mr. MacMahon: They are, your Honor. They came from the revenue agents file.

The Court: Was that the end, so far as this witness is concerned, with this Clover Foundations?

Mr. MacMahon: Let me ask the witness.

Q. Was that the end or was there more to it?
A. Well, we returned the check and withdrew from the

case by notifying the Treasury Department that we were withdrawing from the matter.

(Government's Exhibit 48 marked for identification.)

Q. I show you Government's Exhibit 48 for identification and ask you to identify that (handing).

Mr. Aranow: Just yes or no, please.

[fol. 354] Q. Can you identify it?

A. I can.

The Court: Did you sign it?

Q. Did you sign it?

A. Yes, I did.

The Court: Did you send it to the place that is indicated thereon?

The Witness: Yes, I did.

The Court: You offer it in evidence, Mr. MacMahon?

Mr. MacMahon: I offer Government's Exhibit 48 and the documents your Honor has there all in evidence.

Mr. Rosenblum: I object to all those exhibits on the ground that they are not binding on my client Steinberg.

The Court: These exhibits do no more, Mr. MacMahon, than to confirm what the witness has said about being retained and then withdrawing.

Mr. MacMahon: Your Honor, I submit they are important corroborative evidence. There has been a claim here that Mr. Halperin was some poor old man led around by the nose, who didn't know what was going on, that he didn't work with these people in this thing, and these documents put him right in this ring. Under the Witt case, whether all of these people know about it or don't know about it is immaterial, utterly immaterial, if there is a ring in operation.

The Court: You are offering it then primarily against Max Halperin?

Mr. MacMahon: I am offering it against all the defendants and primarily against Halperin and Grunewald.

Mr. Singer: Would your Honor say that Mr. MacMahon's statement was a fair statement of law that had anything to do with the law on the question of the admissibility of [fol. 355] the evidence? This leading a man by the nose——

Mr. O'Hara: Mr. Grunewald was named as a co-conspirator, not as a defendant.

Mr. Corbin: We don't think that is competent or proper.

The Court: I just wanted to know what it was he pleaded guilty to.

Mr. Corbin: He has already told you.

The Court: Conspiracy, but I want to know what kind of conspiracy he pleaded guilty to.

Mr. Corbin: Well, it is incompetent.

The Court: You haven't received any promises from any judges of this court?

The Witness: No, sir.

Cross examination.

By Mr. Corbin:

Q. Did Mr. Gelb, your lawyer, say anything to you about any talks he had with the District Attorney or District Attorney's office with regard to your plea or the effect of it upon you?

A. He said we would receive consideration for our cooperation with the Government and for our testimony.

Q. Did he not say to you in words or in substance that he had had an understanding to that effect with the District Attorney's office?

A. I beg your pardon.

(Last question read.)

The Witness: That we were to receive cooperation—that we were to receive consideration for our cooperation. He told us that, and that he had such an understanding.

Q. And that the District Attorney's office when the time for sentence came would recommend a suspended sentence [fol. 373] for you?

A. He said nothing about a suspended sentence.

Q. He didn't tell you that?

A. No, sir.

Q. Well, what was the consideration that he told you you would receive?

A. That we would receive consideration at the time of our sentence.

Q. In what respect? What type of consideration? Did he explain?

A. With respect to the sentence that would be imposed.

Q. Yes?

A. And that he had not any understanding as to precisely what kind of sentence we would receive.

Q. That would, of course, reside in the discretion of the judge. But what I am interested in is, what if anything Mr. Gelb told you as to what his understanding with the District Attorney's office was as to what if any recommendation the District Attorney's office would make to the judge at the time of your sentence?

A. That we would receive consideration for having co-operated with the Government.

Q. Consideration? Money consideration?

A. No.

Q. What kind. Didn't he explain to you?

A. Yes. With respect to the sentence that would be imposed.

Q. Well, that is what I am getting at. What did he tell you the District Attorney told him that he, the District Attorney, or his office would do with regard to a recommendation of clemency?

A. That we would receive from the District Attorney a recommendation of clemency.

* * * * * *

Q. In those years, when Hoffman was out doing this work of getting business; were you acquainted with the canons of the American and state Bar Associations in respect of soliciting?

A. I knew that soliciting was not a proper practice.

Q. Had you ever read them?

A. I think I did on occasion.

Q. When you were admitted maybe, but since then, have you ever read them?

A. Perhaps. I can't recall.

[fol. 374] Q. Did you know the special rules of the First Department regarding the conduct of attorneys in Rule 2

covering the solicitation of cases and retainers and business by lawyers?

A. I knew that solicitation was prohibited. I knew it then. I know it now.

Q. You knew it not only as a matter of canon law but as a matter of code law and of Bar Association law and of court rule and of penal law. They all prohibited it, didn't they, to your knowledge at the time?

A. I knew it was prohibited. I don't know whether or not the penal law prohibits it, but if you say that it does, I will take your word for it.

Q. Well, look at Section 270 sometime. But, Mr. Davis, it didn't matter to you whether rule or law prohibited something?

A. It did.

Q. You were willing to engage in it just so far as it enabled you to recover fees as a result of the business that was brought in. Isn't that really true?

A. It is really true that I knew that he was not a lawyer at some time but we shared fees with him nevertheless.

Q. Now, you are talking about splitting fees, which you know is prohibited also, don't you?

A. Yes, I do.

Q. You say, however, that you didn't know he was a layman, you thought he was a lawyer. Therefore, you thought you had a right to split the fees with him.

A. For a while I thought he was a lawyer.

Q. We will come back to that, but I was talking about the solicitation of business. You were willing to take cases that came in as a result of solicitation by Hoffman so long as it meant money to you, weren't you?

A. I was willing to take a case as a result of a solicitation.

Q. Law or no law?

A. Law or no law.

Q. Code or no code?

A. Code or no code.

Q. Ethics or no ethics?

A. Ethics or no ethics.

The Court: Well, let's get to the next question.

[fol. 375] Q. Is it true then after you learned that Hoffman was not a lawyer, you continued to allow him to solicit business and to share and split legal fees with him in that knowledge?

Mr. MacMahon: I object to that question as repetitious. We have gone over it.

The Court: I will allow it.

A. After I knew that he was not a lawyer, I continued to share fees with him in the percentages agreed upon.

. . . . . .

Q. You saw Mr. Polakoff around over the succeeding months and years, didn't you?

A. I saw him. His office was at 475 Fifth Avenue. I saw him from time to time.

Q. Yes.

A. I have no memory of having any sort of extended conversation with him. I may have had some talk with him.

Q. Well, did you ever ask him whether he had ever heard anything from Washington about Grunewald or from Grunewald after the Washington trip?

A. Well, I say that he phoned me to say that he hadn't heard from Mr. Grunewald, but beyond that I have no memory at this time as to whether or not he said to me at the times that I did meet him that he had heard from Mr. Grunewald.

Q. So that so far as your knowledge or memory goes that was the end of the situation so far as Mr. Polakoff and Mr. Grunewald were concerned, right?

A. It was the end of Mr. Polakoff's participation in the matter.

. . . . . .

Q. Isn't it true outside of seeing Grunewald in the lobby as you said on this occasion in April or May of 1948, and having seen him the second time in the Munsey Trust Building in September or October, 1948, right?

A. Yes.

Q. And on a third occasion when you say you and Halperin went down to see Oliphant in April, 1949, those

[fol. 376] are the only three times you ever saw Gruenwald in the course of this whole history?

A. I never saw Mr. Grunewald on the occasion of Mr. Halperin's and my going to Washington in January, 1950.

The Court: That is when you saw Mr. Oliphant?

The Witness: That is when I saw Mr. Oliphant.

Q. You say you saw Grunewald on that occasion?

A. I said that I did not.

Q. Thanks. So that there were only two occasions during the whole period that we have been talking about here that you even saw Grunewald, is that right?

A. Except that I saw the back of his head at one time while he was testifying before the Congressional Committee. I didn't speak with him.

Q. But you never talked with him except to be introduced to him on one occasion? You didn't talk with him on the first occasion when you saw him in the lobby?

A. I did not speak——

Q. And you didn't talk with him when you saw him at the Congressional hearing, is that right?

A. I didn't speak with him at the time I saw him in the lobby, nor did I speak with him at the time I saw the back of his head at the Congressional Committee, but I did have that conversation I described with him in September or October, 1948.

Q. That is when you say Halperin introduced you to him in the Munsey Building?

A. Yes.

* * * * * *

Q. Did you tell us this afternoon or morning something to the effect that "In the last analysis it would be your word against Scherm's word"?

Did you tell Smith that in words or in substance?

A. I did, in words or in substance.

Q. What did you mean to convey to him by that suggestion?

A. I meant to convey to him that he had no occasion for any real alarm because it would be his word against Scherm's word.

[fol. 377] Q. So today you don't feel any occasion for alarm in your condition do you?

A. I feel no alarm.

Q. Because it is your word against Hoffman's word and the word of the others on trial, isn't it?

A. Because it is mine and other people's word against other people's word.

Q. And you are still a lawyer and still free and hope to continue to be free?

A. I hope to continue to be free.

* * * * * * *

Cross examination.

By Mr. Singer:

Q. Mr. Davis, let us see what you pleaded guilty to. You admit, don't you, that you set out to defraud the Government of the United States?

The Court: I can't hear that question.

Q. You admit, don't you, that you set out to defraud the United States Government? You admit that, don't you?

A. Except that I don't know at what time you are talking about.

Q. Well, you set out to defraud them at some time, didn't you?

A. Yes, at some time.

Q. Yes, that is right. Now you admit—I mean there is no question about that, you pleaded guilty?

A. Of course.

Q. So that the crime then is, you admit, as I understand it, that you set out to defraud the United States. So far that is correct, isn't it?

A. Yes.

Q. Now, second, you set out to get other people to commit perjury, isn't that right?

A. I did that, too.

* * * * * * *

Q. I am asking you directly, and I want a direct answer: Did you suggest that Smith commit perjury?

A. Yes.

Q. Now, you know the law. That made you guilty of suborning perjury, didn't it?

A. Yes.

[fol. 378] Q. Now, you know, the law of perjury requires two witnesses before a man could be convicted, or one witness and corroborating circumstances? You remember that?

A. Yes, I know that to be the law.

Q. And you figured that out, didn't you, that if it was Smith's word against Scherm's, then Smith couldn't be convicted of perjury because there were no corroborating circumstances or no second witness, isn't that right?

A. Yes.

Q. Now, that planning, that just didn't occur when you talked to Smith. You knew about that long before, didn't you?

A. Yes.

Q. But, let us see, you knew that Smith had to tell a lie to Mr. Wheeler, isn't that right?

A. When I knew that he was going to go to Mr. Wheeler's office, I knew he would tell a lie, yes.

Q. Now, you knew he would have to tell a lie when you prepared the affidavit?

A. That is right.

Q. At both those times, you believed, did you not, that this lie would be so clever and so well concealed that it would never be discovered, isn't that right?

A. I believed at the time of the preparation of the affidavit that the falsity of the affidavit would never be disclosed or exposed, or that this case would ever come to the attention of the public authorities. And I say also that I thought if it did, he would have a defense because of the fact that it would be one word against the other.

Q. Yes. You not only got a man to lie and helped him to lie, but when you did it you planned an escape hatch for yourself, with your knowledge of the law of perjury and subornation of perjury?

A. I say I knew the law.

Q. Now, you said before that that was one of the things, the risk that you calculated, that even if the affidavit was discovered to be false, that Smith could not be convicted [fol. 379] because there was only one witness to contradict him?

A. That is right.

Q. Now, let us go a little further before I go to the next thing. Didn't you use the words that that provided Smith with a defense? Didn't you use the word defense?

A. I don't believe so. Maybe I did.

Q. I think you did.

A. Maybe so.

Q. You say then whenever you planned one of these crimes that we have so far spoken of, you planned, and quite properly so, the theory of a defense to it, just when you planned it?

A. That is not quite right about planning a defense, but I am saying I had that in mind.

Q. No, I didn't say it was wrong. It is perfectly logical for anybody to plan a defense who has a mind to plan a crime. You agree with me, don't you on that?

A. It is perfectly logical for a person to plan a defense——

Q. A man who plans a crime to try to plan a defense?

A. I would say so.

The Court: But it is not ethical.

Mr. Singer: Well, ethics are not involved in this case.

The Court: In your first question you said it was all right. Go ahead.

Q. Well, you would say that as you were doing whatever the things were that you testified to in this case, you were always doing them with a view that if anything should happen and the matter should be exposed that you would have some defense to it, isn't that right?

A. Well, you speak of the things in this case?

Q. That is right.

A. If you are talking about the affidavit, I say that it was part of my thinking at that time.

Q. You still believed, after you learned that Hoffman was not a lawyer, that he was a certified public accountant? [fol. 380] A. He continued to insist that he was a certified public accountant, and I think I asked him at the same time whether he was certified.

Q. And he lied about it right to your face?

A. He said that he was certified, and he said it to my face.

Q. And he lied to you about it?

A. Yes.

Q. And for several years before, Hoffman had lied to you about whether he was a lawyer or not. Isn't that right?

A. That is true.

* * * * * *

Q. When Hoffman told you in answer to your direct question, "Why, I lied to you, I was never a lawyer," did you throw him out of the office?

A. I did not.

Q. You kept him there because he was valuable to you. Isn't that right?

A. That is correct.

Q. You kept him there because you could make money with him. Isn't that right?

A. Yes.

Q. You kept him there because you could use him to accomplish your purpose, which was to make money?

A. Yes.

* * * * * *

Q. Did I understand you correctly to say that the first thing you ever heard about the Pattullo case was when Hoffman showed you a check for $7,500?

A. That is correct.

Q. You are sure about that?

A. Yes, I am sure about that.

* * * * *

Q. Do you remember ever saying to Mrs. Segel or Mr. Marks that you and your firm or you were the only ones who could keep them out of jail?

A. Don't remember ever saying that.

Q. And you would say to the best of your recollection and belief, no such thing was ever said in your presence?

A. That is correct.

[fol. 381] Q. Now, you pleaded guilty, did you not?

A. I did.

Q. To corruptly endeavor to influence, intimidate and impede witnesses in courts of the United States and before the grand jury and to corruptly influence, obstruct and impede the due administration of justice in the courts and before the grand jury, did you not?

A. Yes.

* * * * * * *

Q. Is that your memorandum on voluntary disclosure or at least a copy of it?

A. It may well be. I am not sure. It may well be.

Q. I have no desire to embarrass you on the subject.

A. You are not embarrassing me.

Q. It is correct, isn't it, that you did have your own office memorandum on the subject of voluntary disclosure?

A. I have no recollection of ever having it.

Q. Look at that photostat that I have given you, Exhibit N. Does that refresh your recollection?

A. I can't be certain that this language is my own. I am not saying that it is not. I have no positive memory of preparing this.

Mr. Singer: Would you mark this as Exhibit N-1 for identification.

(Marked Defendants' Exhibit N-1 for identification.)

* * * * * * *

The Court: Mr. Davis, have you ever seen that document N-1 as far as you know before?

The Witness: I may have, Judge, I can't be sure. I can't —the language is not such that I could be certain it is my composition. There is a likelihood that it is.

The Court: There is a likelihood that it is?

The Witness: Yes, there is a likelihood that it is.

* * * * * * *

Q. Now, it is apparent from what I have read, is it not, Mr. Davis, that this document N-1 was prepared after the [fol. 382] conference with Mr. Wheeler which we have been here told it was in January 1948, is that right?

A. That is correct.

Q. And it is apparent from this that whoever prepared this document had taken the position that the taxpayer had constantly taken the position that a voluntary disclosure was made before the 917 was shown to Mr. Smith, is that right?

A. That is right.

Q. And it is also suggested in here that the agent who refused and denied—who refused to concede the lying claim, that was a lie, wasn't it?

A. It was a lie.

. . . . . .

Q. No. I would rather you read it. The second page of Exhibit N-1.

A. Yes. Now, I think that I prepared this memorandum, yes, and I think that I showed it or gave it to Mr. Halperin.

Q. I see. Now, there is no question about that, is there?

A. It looks very much like it is my memorandum.

Q. Since you now say that you feel very much that it was yours, could you fix the time?

A. Sometime prior to the preparation of the affidavit, which was on October 18th; it could have been anywheres in the month of August or September, 1948, or July, 1948.

. . . . . .

Q. You understand what I am talking about, do you not?

A. I said I lied when I appeared before the Committee counsel with respect to the manner in which we were retained in the Pattullo Modes case.

The Court: You so stated yesterday.

The Witness: I so stated yesterday, yes.

Q. The lie consisted in the fact that you told the legislative committee representative that you knew Mr. Smith about six months before he came to your office to discuss the Pattullo Modes case with you, is that right?

A. Yes, sir.

. . . . . .

[fol. 383] Q. Now, at the time you were before the legislative counsel you were sworn, weren't you?

A. I was.

Q. You raised your right hand?

A. I raised my right hand.

Q. To tell the truth?

A. Yes.

Q. Just exactly in the same form as you did here in court?

A. Exactly the same form.

* * * * * * *

Q. There was an indictment which charged in substance that you and Mr. Schopick had filed a false partnership return. Do you remember that?

A. Yes, I do.

Q. And also that you personally had—let us see; this income tax violation or indictment covered the fiscal year ending January 31, 1949, am I correct?

A. Yes, you are correct.

Q. And you had alleged an income, total partnership income from January 1948 to January 1949 of $36,803, is that right?

A. Approximately.

Q. While in truth and in fact, as the indictment alleges, you had a gross income of $196,000?

A. That is what the indictment alleged, a difference of $160,000.

Q. Now, I am going to come to that.

I assume that the difference as charged in the indictment was the alleged $100,000 in currency paid in the Pattullo matter and the alleged $60,000 in currency paid in the Gotham matter, is that right?

A. That is right.

* * * * * * *

Q. So by not pleading to these ten counts, seven in the second indictment and three in the income tax indictment you have thus far put yourself in the position where you will have avoided 50 years of punishment?

The Court: Objection sustained as to that.

Now, Mr. Singer, in the first place the witness has said that those may still be brought against him. In the second place, I think it should be clear and I think you from [fol. 384] your long experience in the courts know that the rule in this district is if a man is convicted of a conspiracy and a substantive count, the substantive offense charged as a second count in the indictment is embodied within the conspiracy, that although a defendant may be convicted upon both, the courts will not allow accumulation of sentences.

Mr. Singer: I wish that were the law. I wish it were the law.

The Court: That is what I understand the law to be.

Mr. Singer: And I have briefed it, your Honor.

The Court: Well, that is what I understand the law to be. If I am wrong, I am wrong.

Mr. Singer: I have briefed it in the Circuit Court and in the Supreme Court.

The Court: You look at some of the cases.

Mr. Singer: Well, I wish that were the law.

The Court: All right. That is my understanding of the law.

Mr. Singer: Well, I might say, your Honor, if that were the law of this Circuit I could release many men who are now serving time.

The Court: Well, let us go on. That is what I understand the law is.

Mr. Singer: Well, I don't think——

The Court: Give me a memorandum of law on it. If I am wrong I will reverse myself and so instruct the jury. I looked up that question within the last few weeks.

Mr. MacMahon: I submit the whole question is immaterial.

The Court: I think Mr. Singer has a right to bring out the interest of this witness in the matter. I think he has now brought that out, but I don't want any impression here that a man, as Mr. Singer said can avoid 50 years [fol. 385] in jail by such a maneuver. I think that is an entirely wrong impression.

We will now take our morning recess.

(Short recess.)

Mr. Singer: If I have forgotten, may I respectfully except to your Honor's sustaining of the objection to the last question and to your Honor's ruling?

The Court: Yes, you certainly may, and that goes to all counsel.

Mr. Rosenblum: Including Steinberg.

The Court: That goes to all counsel.

Mr. MacMahon: Just so that the record will be clear——

The Court: Just a minute. And if you think my statement of the law is wrong, I will be glad to receive any memorandum of counsel on that point, and if I am wrong, I will so instruct the jury.

Mr. MacMahon: Your Honor, I just want it clear that the basis of the Government's objection was that it was immaterial. Do I understand that that is the basis on which your Honor sustained it?

The Court: I sustained it on that objection, yes.

Mr. Singer: I respectfully except.

* * * * * * *

The Court: Would there have been books in existence which would have shown the names of every client from whom a fee was received?

The Witness: The cash book would have shown that.

Q. What happened to the cash book?

A. It was lost.

Q. Oh, it was lost before these men, whom we have talked about, Mr. Meehan and his assistants, came into examine your records?

A. It was lost before then.

Q. Is that right?

A. Yes.

[fol. 386] Q. And I assume—and I can take that guess and amend it—that it was lost in the shuffle, when Schopick and Hoffman moved out. Isn't that the way it always works?

A. And when Newberger and Tepper came in, when people were moving in and out. I am saying it is very likely it was lost then. It might have been lost on another occasion.

* * * * * * *

Q. So that when these men came in to look at your books, your cash book was missing?

A. Long before then.

Q. But when they were there, it was not there?

A. When they were there it was not there.

Q. And the only things that these men from the Treasury Department could check with respect to receipts was this check book in which you say you had entered all the checks you had deposited?

A. No, the check stub book wasn't there either.

Q. All of your fees were completely by check?

A. That is correct, to the best of my recollection.

Q. Tell me, and I don't want to bring up this subject, but since we are speaking of currency, Mr. Corbin and you had discussed some wife trouble. I am not interested in that detail, but wasn't there a claim made in that wife trouble that there was $125,000 in cash in your box which you had taken out? Isn't that right?

A. She claimed that.

Q. She did?

A. She didn't claim it was taken from the box. She said she handed it to me.

Q. She said you had $125,000 in cash in 1950 or 1951, 1952? I don't know when it was. Isn't that right?

A. After the newspaper's report carried the story that this money was supposed to have been given to me and to Hoffman.

[fol. 387] Q. And your wife said too did she not, that this money had been in the box, this box that you told Mr. Corbin yesterday had only $2,000 in it?

A. That is right.

Q. And your wife said further, didn't she, that this box of yours was in her name and your name as joint tenants?

A. That is right.

Q. That would be right. So that the net fee to you would be $100,000?

A. That is correct.

Q. That is just about it?

A. About that.

Q. That is, of course, pursuant to the checks.

A. Those are the fees that we got from the clients.

Q. By checks?

A. Those are the fees that we were paid by the clients.

Q. By check?

A. These payments were made to us by check.

The Court: Those are the fees received by check less the disbursements which you also made by check, did you?

The Witness: That is correct.

Q. Then in addition to this $100,000, you did receive, and you admit that you did, $100,000 in cash additional?

A. Not for us.

Q. You did receive it?

A. Physically, yes.

Q. What do you say about it personally?

A. I say that the $100,000 was in Mr. Halperin's possession, and that it was counted, and that it went on its way, just as I have described it in my testimony.

Q. And you swear to that under oath?

A. I swear to that under oath.

Q. Under the same oath you made in other places where you told lies?

[fol. 388] The Court: Whether it was the same oath or not, he has admitted he swore falsely.

Mr. Singer: That is right.

Q. How much of this $100,000 did you personally take, your take?

A. How much of this $100,000——

Q. For yourself.

A. Nothing.

Q. Not one thin dime?

A. Not one thin dime.

Q. Now, then, going back to the time these agents came in, in November 1948, there was then, according to what you say, lying in a box $100,000 in cash currency that the taxpayers put up with you, and which you had given to Halperin to hold?

A. That is correct.

Q. And you had agreed completely to cooperate with the Government in every respect in connection with the Pattullo matter?

A. I did.

Q. And that the taxpayers upon your advice agreed to make such cooperation?

A. They did.

Q. The point of the cooperation was, if I understand your testimony correctly, that if the voluntary disclosure feature of the defense did not stand up, then the cooperation with the Department might serve as a reason for not prosecuting. Isn't that right?

A. We were told that if we cooperated, there would be a no-prosecution consideration.

Q. So that I may understand this correctly, it was Mr. Saver who told you or gave you the information concerning which you have just given testimony? That is, if you cooperated, there would be no prosecution?

A. That is correct.

Q. Did Mr. Saver know at that time that you had taken $100,000 from your clients under the circumstances you have just described?

A. He did not know.

Q. Did you tell it to him?

A. No.

* * * * * * *

[fol. 389] Q. Did you expect that your going down to Washington and speaking to Mr. Oliphant would cause him to there decide to acquiesce or not to acquiesce?

A. No. I only went down for the purpose of finding out whether or not the Government had by any chance already agreed to acquiesce.

Q. In other words, all you were seeking was just that bit of information?

A. That is all.

Q. And there was nothing corrupt or improper that you wanted Mr. Oliphant to do?

A. Certainly not.

Q. And for that you were willing to recognize, as you put it, Mr. Halperin and pay him a part of the fee?

A. Certainly.

Q. Now, as a matter of fact the taxes of Pattullo Modes were still under discussion in December of 1950. They had not yet been——

A. December 1950?

Q. —had not been yet determined?

A. I don't know that it was. I think that the conference in which an understanding was reached with respect to the corporation's tax liability had occurred some time in August 1950.

Q. Well, by August 1950 was this decision acquiesced in or not?

A. I don't know.

Q. Apparently the whole——

A. I don't think so. I am not sure.

Q. The whole thing dropped right out of the picture. It wasn't even considered later?

A. Oh, no, sir. It was considered later.

Q. Was that compromise or conference or whatever it was—was the effect of that case recognized by the confrere in New York?

A. That and other cases. That case was not the only case that bore on the problem. There were other cases.

Q. And that is the only reason that you can think of for having gone down to see Mr. Oliphant in January 1950?

A. That is correct.

Q. No other reason whatever?

A. I answered that no.

[fol. 390] Q. Now, tell me, was that trip down to Washington in furtherance of any conspiracy as far as you know?

Mr. MacMahon: Your Honor——

The Court: Objection sustained. That is a legal conclusion you are calling for.

Q. Did it have anything to do with the criminal phases of the Pattullo Modes case as far as you know?

Mr. MacMahon: Your Honor——

The Court: I will allow him to answer that.

A. That did not.

Q. Did it have anything to do with the criminal phases of the Gotham Beef case?

A. No, sir.

Q. Now, you testified yesterday concerning an incident that occurred, and I am limiting the inquiry to just what you said in direct examination, about something that occurred—it is on page 2309, when you went I think you said in March of 1952, you went to the office of Tobias, and you said you were not sure whether you met Mr. Berman?

A. Yes, I remember that.

Q. You testified about that on direct examination. I think you said in substance that you told Mr. Tobias that you were contemplating cooperating with the Government and you wanted to tell them in advance that you were going to tell the Government about the dealings between you and Tobias?

A. That is right.

Q. And then——

A. All of our dealings.

Q. And then Tobias said to you, or Tobias and Berman, that they would take the position that they paid fees and that is the only position they would take, is that right?

A. I think they said that in substance.

Q. So that Tobias and Berman told you in March 1952 that they would deny that they ever gave any money in cash, is that correct?

A. No.

[fol. 391] Mr. MacMahon: I object to the form, your Honor.

The Court: The witness has answered. He said no.

Q. I didn't hear your answer.

A. No, sir. They never said to me that they would deny it.

Q. Did they say they would admit that they gave you money in cash?

A. They said what they paid, they would say, would be fees or was fees.

Q. And you said that you didn't yet finally know what your position was going to be?

A. That is right.

Q. I think you said at that time you were not on speaking terms with Mr. Halperin?

A. I think so.

Q. That you went there without having discussed this with Mr. Halperin before you went there?

A. That is right.

Q. And that you didn't tell him about it until several months later?

A. A month or two.

Q. You said you thought it was a month or two months or three months, and I am reading from——

A. Did I say one or two or three months or just two or three months?

Q. A month or two months or three months.

A. Yes, possibly.

Q. And I am reading from 2310.

A. Yes.

Q. So that your visit to Tobias in Merdinger's office and your talk with Berman was at a time when you were not on speaking terms with Halperin?

A. Yes, I think that is so.

* * * * * * *

Q. Now, do you remember going to a hotel in Newark known as the Military Hotel with Mr. Halperin?

A. Yes, I do.

Q. Do you remember when you went there? Was it in 1948?

A. No, I don't think so.

Q. Do you remember meeting a man whose name was William Davis?

A. I do.

[fol. 392] Q. Do you remember having lunch with Mr. William Davis?

A. Lunch? I don't believe I had lunch with Mr. Davis.

Q. You did have a conference?

A. Just a brief talk.

Q. And Mr. Halperin brought you over? He arranged this appointment with you and Mr. William Davis?

A. He arranged it and he asked me to go with him.

Q. Well, you did go to see Mr. William Davis?

A. Yes.

* * * * * *

Q. Now then, did you ever have a safe deposit box with a woman whose last name is Holden—H-o-l-d-e-n?

A. No, I did not.

Q. So that I can identify her, I don't know her first name, I think she runs a music school of some kind, is that right?

A. That is right.

Q. You know such a women?

A. Of course I know her.

Q. You say you never had a safe deposit box with her in her name and your name?

A. No. I say that.

Q. Did she ever have any of your property in a safe deposit box which she had in her own or some other name?

A. Not so far as I know.

* * * * * *

Q. Is it a fact that you want this jury to understand that the total gross fee before taxes that you got out of the Beef case was $1,200?

A. Actually received, my end, yes.

Q. And Hoffman got about the same?

A. Of course.

Q. And Schopick got a smaller amount?

A. That is right.

Q. And you didn't get any cash at all?

A. No.

Q. And you say for that you committed the crime of bribery?

A. Bribery?

Q. Yes. Did you bribe somebody? You claim that or don't you?

A. You mean by bribery that we passed money to a Government official?

[fol. 393] Q. You tell us.

A. We engaged in a conspiracy to buy influence for the purpose of getting a result in a case that I didn't think we were entitled to.

* * * * * * *

By Mr. Rosenblum:

Q. On what date did you plead guilty, Mr. Davis?

The Court: What was that?

Q. What was the date?

A. Somewheres in the latter part of August I think 1954.

Q. Do you recall on any occasion after that the United States Attorney's office, I mean any member of the staff, brought to your attention the fact that Mr. Marks and Mrs. Segel and the other members of the Pattullo group had no recollection of the $40,000 item to Scherm which you referred to?

Mr. MacMahon: Your Honor, I object to that question. That wasn't the testimony of Marks and Segel.

Mr. Rosenblum: They said their mind was blank six years.

The Court: Now, that is a different matter. They said they had been blank for a long time.

Mr. Rosenblum: Six years, they said. I want to know whether this was brought to his attention.

The Court: After he pleaded guilty whether he was told by anybody on the United States Attorney's staff that they had a blank mind on that?

Mr. Rosenblum: They said they had a blank mind.

The Court: I will let the witness answer. Did you hear that?

The Witness: I was told they hadn't remembered it.

Q. Who hadn't remembered it?

A. The Pattullo people.

Q. I mean all the members of the group, Zipser, Cohen, Mrs. Segel, Marks?

A. There was no identification to me.

Q. They didn't give you the names?

A. No.

[fol. 394] Q. And who told you that?

A. I don't remember. It may have been Mr. O'Hara.

Q. Thereafter did you confront any member of the Pattullo group and tell them what your recollection was?

A. That is correct.

Q. And when was that?

A. Perhaps in October or November.

Q. Whom did you talk to on that occasion or did you confront?

A. Mr. Marks.

Q. And who was supposed to have brought the $40,000 to you?

A. Mr. Marks.

Q. And you were refreshing his recollection?

A. I wasn't refreshing his recollection; I was simply stating what I knew and he was listening to it.

Q. And did you know that he was seeking immunity?

A: Did I know that he was seeking immunity?

Q. Yes.

A. I didn't know precisely what he was seeking.

Q. And you say that you were telling the man who you swore brought you $40,000 that he was wrong when he had no memory on it?

A. I was simply stating what I knew in his presence.

Q. And he was stating the opposite?

The Court: What did he say at that time?

The Witness: I think he said he didn't remember or wasn't sure; something like that.

* * * * * * *

Re-direct examination.

By Mr. MacMahon:

Q. Mr. Davis, do you recall some question on cross examination having to do with your safe deposit box and so on? Did there come a time when you liquidated all of your personal assets?

A. Yes.

Q. And when was that?

A. In the months of March and April, 1952.

[fol. 395] Q. And did you discuss the liquidation of those assets with anyone else before you liquidated them?

A. With Mr. Hoffman, with Mr. Schopick and with Mr. Halperin.

Q. Do you know what they did with respect to their assets?

Mr. Singer: I object to that.

The Court: I will sustain that. He can tell what he did.

Mr. MacMahon: Your Honor, I submit he can also tell, if he knows, what the others did.

The Court: I don't think so.

Q. Did you discuss with them what if anything they would do in connection with their assets?

A. We discussed disposition of our assets.

Q. Did you ever reach any agreement with them with respect to the liquidation of assets?

A. Each of us said, without there being an agreement, each of us said he would dispose of his personal assets. When I say "dispose," turn them into cash.

The Court: That is what you mean by liquidating?

The Witness: Yes.

Q. What did you do with the cash that resulted from the liquidation of your assets?

A. I gave it to my wife.

Q. How much cash was that?

A. The amount of money that was taken to the bank was in the neighborhood of $27,000. I think I liquidated some stock and sold a real estate interest. I think in the neighborhood of $35,000 or $40,000; somewheres in that neighborhood.

Q. Now, Mr. Davis, do you recall at or about the time of the Brooklyn grand jury in 1952 any negotiations conducted on your behalf looking to cooperation by you and Hoffman?

Mr. Singer: That I object to on the ground that it is improper re-direct. There were no questions asked on [fol. 396] cross examination concerning any such thing.

Mr. Aranow: It is improper in form.

(Last question read at the request of the Court.)

The Court: Well, I will sustain the objection. If it has something to do with the liquidation of assets, go at it another way.

Mr. MacMahon: Your Honor, I submit I have a relevant purpose in mind.

The Court: Relating to something brought out on cross examination?

Mr. MacMahon: Yes, your Honor, very much.

The Court: Well, I will let the witness say whether there were any negotiations.

The Witness: There were such negotiations.

Mr. Singer: I respectfully except.

The Witness: On behalf of Schopick——

Q. Were these negotiations conducted before you were indicted for income tax evasion?

A. Yes.

Q. And were they conducted before you were indicted for conspiracy to defraud the United States to which you pleaded guilty?

A. Yes.

Q. And who was your attorney at that time?

A. Mr. Maxwell——

Mr. Singer: Objection.

The Court: I will let him say who his attorney was.

Mr. Singer: I respectfully except.

The Witness: Maxwell Goldstein.

Q. Do you recall a conference at that time between your attorney and representatives of the United States Government at which you disclosed the facts testified to on this trial?

[fol. 397] Mr. Singer: I object to that on the ground that it is improper re-direct. There wasn't one single question asked about this subject in all of the cross examination.

The Court: There were a lot of questions asked about when he revealed certain facts.

Mr. Singer: It was never discussed except in so far as it related to a specific item.

The Court: Well, certainly as to the one specific item——

Mr. Singer: Well, I have no objection to his mentioning that——

Mr. MacMahon: Your Honor, may I submit that the witness' testimony was attacked as a recent fabrication which followed his indictment for income tax evasion, the suit by his wife, and his indictment for this conspiracy to which he has pleaded guilty.

The Court: You want to know whether he revealed the facts——

Mr. MacMahon: I want to show that it wasn't such a recent fabrication.

Mr. Singer: You have made the statement now that you want to show that he personally revealed facts? That is quite different from saying that somebody else did it.

The Court: Well, let us get at the substance of it. You are asking whether this witness was present at a conference with his lawyer in the United States Attorney's office?

Mr. MacMahon: I am asking him that, yes.

The Court: It was a discussion of the facts which he has testified to?

The Witness: I wasn't present at the conference.

Mr. Singer: I object to anything——

The Court: Wait a minute.

Mr. MacMahon: Your Honor, may I develop what the circumstances were?

[fol. 398] The Court: Wait a minute. Let the witness finish his answer.

What was the answer?

The Witness: I wasn't present at the conference between my attorney and the representatives of the Government at the time these disclosures were made.

Mr. Singer: I ask that the latter part be striken out. Why does he put something in that is not responsive? That is the very point.

The Court: I will strike out the last part.

Mr. Singer: And I ask that there be no further inquiries on this subject.

The Court: No, no, I am not going to cut the Government off on that.

Mr. Singer: I respectfully except. Certainly it is improper re-direct.

The Court: No, I don't think it is improper re-direct in view of the cross examination.

Mr. Singer: Your Honor, may I ask again—I don't want to criticize, that I am interrogating him, but may I respectfully ask somebody to point out any place in the cross examination on this subject——

The Court: Well, I think there was an attempt in the cross examination to create the impression, right or wrong, it may be right, it may be wrong, that the witness brought these facts to light after he was indicted. Now if the Government wants to show to the contrary, I think they have a right.

Mr. Singer: I respectfully except.

Mr. Gottesman: If your Honor please, referring to what I think your Honor is referring to, I say this witness made an unequivocal statement and the Government is bound by his answer. This is a Government witness. The Government can't go out now and attempt to build this man up on something he said.

The Court: We are not faced with that problem of building anybody up.

[fol. 399] What is the next question?

Mr. Rosenblum: May we all have an exception?

The Court: Yes. The witness said he wasn't present at the conference between his lawyer and the Government.

Q. Do you recall a conference between Mr. Goldstein, Mr. Esbitt, Mr. Kennedy and Mr. Joseph N. Feldman on March 25, 1952? Do you know of such a conference?

A. I knew of such a conference, yes.

Q. Did you authorize your attorney to make certain disclosures there on a hypothetical basis?

A. Yes.

Mr. Singer: I object to the question and ask that the answer be stricken out and that the jury be told to disregard the question.

The Court: The motion is denied. You may have an exception. The witness said he did know of such a conference.

Q. And did your attorney discuss such disclosures with you?

A. Yes.

Mr. Singer: I object. Just a moment, will you, please?

The Witness: I beg your pardon.

Mr. Singer: Don't do that. I am entitled to make an objection.

The Court: Well, what is the objection?

Mr. Singer: First I ask that his answer be stricken out. Now, I also object to the question upon the ground that it is incompetent, irrelevant and immaterial. I think it is entirely hearsay, not within the issues of this case, not in furtherance of the conspiracy, and not proper re-direct.

Mr. Aranow: Improper in form.

Mr. Singer: A discussion of some hypothetical situation.

[fol. 400] (Paper marked Government's Exhibit 49 for identification.)

The Court: The witness said he did authorize his attorney to discuss some hypothetical situation. I don't see that that says very much either way. Now I overrule your objection.

Any further questions?

Mr. Singer: I respectfully except.

Q. Was the hypothetical situation which you authorized your attorney to discuss the facts involved in the conspiracy to defraud the United States in connection with the Gotham Beef and the Pattullo Modes case?

Mr. Singer: I object upon the grounds I urged with respect to the last question.

The Court: Objection overruled.

Mr. Singer: And I respectfully except.

The Witness: The hypothetical statement dealt with the facts in the Pattullo case and in the Gotham case.

Mr. Singer: I move to strike out the answer upon all the grounds urged.

The Court: The motion is denied.

Now, let me see if we can't get this straight. This was in 1952, you are talking about?

Mr. MacMahon: Yes.

The Court: That was long before you were indicted?

The Witness: Yes, sir.

The Court: Now we are talking about a hypothetical statement.

When did you first tell the facts to the Government, Mr. Witness, directly or indirectly that you testified to?

Mr. Singer: Now, I object to that.

The Court: That is just shortcircuiting what is a long story.

[fol. 401] Mr. Singer: I object. I am sorry I have to object to your Honor's question, but I must maintain the proposition of law that unless he personally did something —I certainly am not going to have hearsay.

The Court: All right. I will sustain it. I will sustain the objection. All right.

Now, when did you first tell the Government personally about it?

The Witness: Personally? It would be either before my plea or immediately thereafter.

The Court: Did you prior thereto authorize any attorney to reveal those facts to the Government?

Mr. Singer: That I object to.

The Court: Objection overruled.

The Witness: I authorized my attorney to reveal the fact with respect to the $100,000 and the $60,000.

By Mr. MacMahon:

Q. And did he report to you that he did?

Mr. Singer: I object.

The Court: I sustain the objection to that. He authorized his attorney to do it.

Q. Was your attorney Mr. Goldstein?

A. That is right.

* * * * * *

By Mr. MacMahon:

Q. I show you Government's Exhibit 49 for identification and ask you to read it (handing).

Mr. Rosenblum: If there is another copy, may we see what witness is seeing?

Mr. MacMahon: I have no other copy, your Honor.

The Court: Is it in evidence?

[fol. 402] Mr. MacMahon: No, your Honor.

The Court: Is it something this witness prepared or should know about?

Mr. MacMahon: I have a question I want to ask him after he has read it.

Mr. Singer: Would you mind having him answer the Judge's question whether or not it was something prepared——

Mr. MacMahon: Yes, I would mind at this time. I would like to conduct my own examination.

Mr. Singer: All right, I withdraw it.

The Court: Can you ask a question now, Mr. MacMahon?

Mr. MacMahon: I am afraid, your Honor, he has to read it before he could begin to answer my question.

Mr. Rosenblum: Your Honor, we have to read it too. We are entitled to it.

Mr. MacMahon: Your Honor, could I call your attention to a decision here while we are waiting (handing to the Court).

Q. Have you read it, Mr. Davis?

A. Yes, I have.

Q. Does Government's Exhibit 49 fairly state the facts as you authorized your attorney to present to the Government in March 1952?

A. Fairly——

Mr. Singer: I object upon the grounds I have already——

The Court: I will sustain the objection at the present time unless you identify what this document is.

Q. Do you know what the document is?

Mr. Singer: I object to it.

Mr. Afanow: I object to it as calling for the contents of a paper not in evidence.

[fol. 403] The Court: Wait a minute. One at a time.

What is your objection, Mr. Singer?

Mr. Singer: I object to it upon the ground it is improper, incompetent, irrelevant and immaterial, not binding on these defendants, not within the issues in this indictment,

not the best evidence, not proper re-direct, and it is certainly improper in form to ask somebody what a document is that has not been offered in evidence.

The Court: The only question so far is if the witness knows what this document is. So I will overrule your objection.

Mr. Singer: Exception.

A. It is a memorandum of a conference that was held between my attorney——

Mr. Singer: I object to that. That is the point I am getting at.

The Court: I will let the witness answer. He says he knows it is a memorandum of a conference——

Mr. Singer: May I interrupt, your Honor?

The Court: He says——

Mr. Singer: Wait a minute. If he reads a paper he has never seen before——

The Court: I don't know whether he has seen it before.

Mr. Singer: He wasn't present there. So you might give me a book and say, "What is that book" and I read the caption——

The Court: Mr. Singer, I think you may be getting to a very good objection at a certain point, but this witness was asked "Do you know what the document is?"

Mr. Singer: I may be objectionable, but I rely upon my exception.

[fol. 404] The Court: Your objection is overruled. You may have an exception.

Do you know what the document is?

The Witness: It is a memorandum.

The Court: Written by whom?

The Witness: I don't know who wrote it.

The Court: It is a memorandum of a conference?

The Witness: Yes.

The Court: Were you at the conference?

The Witness: No, I was not.

The Court: Do you know whether the memorandum properly states what happened at the conference if you weren't there?

The Witness: No, I don't know whether it does since I wasn't there.

The Court: All right, Mr. MacMahon.

By Mr. MacMahon:

Q. Does the memorandum properly set forth and state what you authorized your attorney to state at that conference?

Mr. Singer: That is objected to.

The Court: I will sustain the objection. I think that you can bring out what this witness authorized his counsel to state to the Government.

Q. What did you authorize your counsel to state in March 1952?

Mr. Singer: That is objected to upon all the grounds urged.

The Court: Objection overruled because I think the question has been raised as to whether the defendant told his story to the Government for the first time after he was indicted, and I think the Government is entitled to bring out when he authorized somebody to tell that story to the Government.

[fol. 405] When did you do that?

The Witness: In March of 1952.

The Court: What did you authorize?

The Witness: I authorized the attorney to inform the Government that $100,000 had been paid in the Pattullo case and $60,000 in the Gotham Beef Company case.

Mr. Singer: I move to strike out the answer on the ground that it is improper re-direct, upon the ground that it is an attempt here to create evidence of incidents concerning which no direct inquiry was made, and which are not part of the conspiracy, and are narrative of past events.

The Court: Your objection is overruled.

Mr. Singer: I respectfully except.

The Court: This is taken not as evidence of the conspiracy, as I understand it, of the indictment but evidence which would tend to indicate that the witness had not

first revealed these facts after he was first indicted or in connection with an indictment.

Mr. Singer: I object to your Honor's statement. I would say very respectfully that that was not the purpose for which Mr. MacMahon stated it, but I object even for your Honor's purposes because that certainly is not a proper line of inquiry.

Mr. MacMahon: I except to what Mr. Singer has just said. I plainly stated my purpose was to refute the charge of a recent fabrication, which was made in this case.

The Court: What I said was saying the same thing in another way.

Mr. Singer: Look, Mr. MacMahon said what he just said but your Honor's didn't say the same thing. I don't want to become involved in any personalities here.

The Court: Well, none of us do.

[fol. 406] Mr. Singer: I don't intend to, if I can avoid it, but I dispute what you said. I disputed in a sense that his Honor was trying to paraphrase what you said, Mr. MacMahon.

The Court: Maybe I paraphrased it wrong.

Mr. Singer: In a different fashion entirely.

The Court: Maybe I was wrong then.

Mr. Singer: I object to it upon all the grounds I have urged.

The Court: Your objection is overruled and you may have an exception.

Mr. Singer: I except.

By Mr. MacMahon:

Q. At that time back in March of 1952, did you authorize your attorney to tell the Government what you had done with the $100,000 in the Pattullo case and what you did with the $60,000 in the Gotham case?

Mr. Singer: I object to that upon all the grounds I have urged.

The Court: Objection overruled.

Mr. Singer: I respectfully except.

A. We authorized him to inform the Government.

Mr. Singer: I move to strike the answer out.

The Witness: —as to what was done with those moneys.
The Court: Motion denied. You have an exception.
Mr. Singer: Exception.
The Court: Now, you have made your point, Mr. MacMahon.

Q. Were the facts that you authorized him to state then the same facts to which you now tesitfied?
A. With respect to those moneys, yes.
[fol. 407] Mr. Singer: I object to that and move to strike it out.
The Court: Motion denied.
Mr. Singer: Exception.
Mr. Rosenblum: Exception.

Motion for Mistrial and Denial Thereof

Mr. Singer: Now, I move for the withdrawal of a juror and a declaration of a mistrial upon your Honor's admission into evidence of the testimony on this matter, upon all of the reasons I urged with respect to my objections to the testimony.
The Court: Your motion is denied.
Mr. Singer: I respectfully except.

* * * * * *

Re-cross examination.

By Mr. Singer:

Q. On re-direct here today, you said that at some time in 1952, you decided to—what word did you use—liquidate all of your assets?
A. That is right.
Q. You turned all of your property into cash and you had about $35,000 or $40,000?
A. Or slightly more. I don't remember.
Q. Likely more?
A. Or slightly more.

* * * * * *

Q. When you got the $32,000 or $40,000, or whatever you say it was, did you put that up in that vault at 105th Street, the Corn Exchange Bank?

A. I gave it to my wife to hold.
Q. She was a joint tenant in that box?
A. But I don't think she put it in the vault.
Q. She kept it at home?
A. Either at home or over where she was teaching.
Q. Over at that woman—what is her name?
A. Ann Holden.
Q. Over at the Holden woman's school.
A. It was a school run by a number of people.
[fol. 408] Wha did she keep it in, a tin box or a safe?
A. I don't know how it was kept over there.
Q. Are you kidding? Do you mean this?
The Court: Wait a minute. Ask questions.

Mr. Singer: I must understand it.

Q. You gave your wife, let us say it is $35,000. It was at least that much?
A. I would say so, yes.
Q. In currency, and you don't know what she did with it, but she did say or somebody told you that she took it over to Mrs. Holden's music school and left it there for safe keeping. Is that right?
A. I say that we didn't want to keep our moneys—I say all of us, all the people that were involved——
Q. Let us talk about you.

Mr. MacMahon: Let the witness answer.
The Court: Just a minute.
Mr. Singer: I am talking about you.
The Court: You have asked a question. I am going to let the witness answer.
Mr. Singer: I want an answer to my question.
The Court: Let us see what he is saying. If it is not responsive, we will strike it out.
Mr. Singer: The law requires me—I will show your Honor the authority—to arrest an answer that is unresponsive.
The Court: Read the answer.
Mr. Singer: I will give him a chance to talk about anybody else.
The Court: Let me hear the question.
Mr. Singer: I would like an answer——.

The Court: Read the answer.

(Answer read.)

Mr. Singer: At that point I arrested his answer. I was asking him about his money.

[fol. 409] The Court: Read the question.

(Question read.)

The Court: Is that right?

The Witness: She told me that she took the money over to the school. I did know what she did with it.

Q. I see. When I asked you this morning on cross examination whether you ever had a safe deposit box with a woman by the name of Holden or whether she or you ever held money together, you said no. Do you remember that?

A. You asked me whether or not we had a box together and I said that we did not. Whether or not you asked me did she hold any money for me, the answer is still no because it was placed in some receptacle in the school and she did not keep it for me.

Q. Miss Holden was keeping it for your wife, who was in turn keeping it for you?

A. I knew Miss Holden just as well as my wife knew Miss Holden.

Q. Yeah—

A. And it wasn't she who was keeping it as an individual. It was placed in the school.

Q. The school was keeping it for you?

A. I say the money was placed in——

Q. The school was keeping the money?

The Court: That is a technical distinction. Where was it put in the school?

The Witness: I think a closet or a drawer.

Q. Yes, a closet or a drawer?

A. Yes.

Mr. Singer: That is all.

The Court: Now, I am going to ask the witness one question.

You said in 1952 you authorized your attorney to tell

about the $100,000 and the $60,000. Did you authorize your attorney to say anything about the $40,000?

[fol. 410] The Witness: No, we did not.

The Court: Did you know it at that time?

The Witness: I did know about it.

The Court: But you didn't authorize him?

The Witness: That is right.

Mr. Singer: I want the record to show that I object to your Honor's last question on the same grounds that I objected to any of the other questions with respect to an alleged conversation or dealings with lawyers or representatives of the Government in 1952, and I respectfully except to your Honor's ruling and asking the question and the answer.

The Court: What we are interested in is the facts, and that is the important thing.

(Adjourned to March 4, 1955, at 10:30 o'clock a.m.)

New York, March 4, 1955,

10:30 o'clock A.M.

Trial resumed.

Stipulation of Counsel

Mr. O'Hara: Your Honor, there is one preliminary matter all counsel have stipulated with respect to the impaneling of the grand jury in Brooklyn and the investigation it conducted, and the constitution of the sub-committee of the Committee on Ways and Means of Congress.

At this time I would propose to read the stipulation into the record.

The Court: Is that satisfactory?

Mr. Rosenblum: Yes.

The Court: All right.

Mr. O'Hara: It is hereby stipulated and agreed by and between counsel.

[fol. 411] 1. That on February 18, 1952, a grand jury of the United States District Court of the Eastern District of New York was duly impaneled. That said grand jury

(popularly referred to as the Brooklyn Grand Jury) instituted an inquiry and investigation into possible violations of the Internal Revenue Laws of the United States and into possible violations of law in the administration and enforcement of the Internal Revenue Laws and in the administration of the affairs of the Bureau of Internal Revenue and the Internal Revenue Service in the Eastern District of New York. Said inquiry and investigation continued until February 24, 1953, when the grand jury was duly discharged by the Court.

2. That during the period from February 2, 1951, to October 30, 1953, the Committee on Ways and Means of the United States House of Representatives, acting by and through its duly organized and authorized sub-committee on administration of the Internal Revenue Laws, a competent tribunal, was duly conducting an inquiry and investigation for the purpose of determining whether or not the safeguards concerning the selection, promotion and conduct in office of officials charged by law with the duty of administering the Internal Revenue Laws were adequate to insure honest, competent and undivided service. The Sub-Committee has been popularly known and referred to as the "King Committee" with respect to its activities during the period January 13, 1951, until January 14, 1953, under the chairmanship of Representative Cecil R. King, and has been popularly known and referred to as the Kean Committee with respect to its activities during the period January 15, 1953, to October 30, 1953, under the chairmanship of Representative Robert W. Kean.

The Court: That stipulation is accepted by all counsel for defense.

[fol. 412] Mr. O'Hara: Also, your Honor, Defendants' Exhibits I and H in evidence have not been shown to the jury. Those are the records of the Trade Bank and Trust Company, and with the Court's permission I would simply like to show those records to the ujry, not pass them among the jurors, but indicate what is on the record, since there has been so much testimony with respect to it.

The Court: That is satisfactory. Anything which is in evidence may be shown to the jury or read to them.

Mr. O'Hara: Defendants' Exhibit H is entitled "Box

History" and it is dated, Rented 9/15/48; Date Surrendered, 11/17/48, and under the name of Lessee it reads "Max Halperin or Leo Greenstein."

Exhibit I consisting of five sheets of paper, on one sheet entitled Report of the Trade Bank Safe Deposit Company, 48th Street Office, Surrenders and Transfers, there appears among many of the other items listed on the page, under the date of 11/17/48, under New Boxes Rented, it says "Closed 9/15/49." That would be the date the box expired, the rental of the box, the number of the box being 1377, the amount being $20, and in the last column under name it says "Max Halperin and Leo Greenstein." One of the other pages says, Box No. 1377, and under name it says "Max Halperin, address 535 Fifth Avenue, New York City, paid by cash. Expired 10/2/49." And that is all of the records I believe of the Trade Bank with respect to the boxes in question.

Mr. Singer: Well, that is not correct. That is not all.

Mr. O'Hara: Of the Trade Bank.

Mr. Singer: There was a receipt offered.

The Court: Yes, that receipt which was read.

Mr. Singer: Their receipt is their record. I don't want to quarrel with it.

[fol. 413] The Court: The receipt was also read to the jury.

Mr. O'Hara: Also, with your Honor's permission, I should like at this time to read Government's Exhibits 45 and 46 in evidence, which are the powers of attorney in connection with the Glovers.

The Court: In connection with what?

Mr. O'Hara: In connection with the Glovers.

The Court: Glovers? They were introduced in evidence.

Mr. O'Hara: They were introduced in evidence.

The Court: All right. You may read them.

Mr. Singer: That is, without waiving my objection.

The Court: Without waiving your objection.

Mr. O'Hara: Government's Exhibit 46 reads as follows (reading Government's Exhibit 46 to the jury).

(Mr. O'Hara read Government's Exhibit 47 to the jury.)

Mr. O'Hara: At this time we call Joseph S. Greenberg.

JOSEPH S. GREENBERG, called as a witness in behalf of the Government, being first duly sworn, testified as follows:

Mr. Singer: If your Honor pleases, so that I don't interrupt the witness and make an objection to each question and each answer, I am informed that this is the witness—at least I have learned that this is the witness—that has to do with the Glover matter concerning which Mr. Davis gave certain testimony. We objected to that testimony when Davis gave it, and without repeating the grounds of the objection, we make the same objection to each and every question that may be asked of this witness on that subject of any dealings in the Glover matter, upon all of the [fol. 414] grounds which we urged with respect to that testimony when it was offered when Mr. Davis testified.

The Court: What particular ground do you now advance?

Mr. O'Hara: Excuse me. I would like actually to argue this point of law to your Honor. We really did not argue it on the objection previously. I think perhaps it should be argued with the jury absent.

The Court: Yes.

Mr. O'Hara: And I would suggest we might do that at this time.

The Court: I don't like to pass on the general objection to all the testimony that some witness may give in the abstract, because I don't know what he is going to say.

Mr. Singer: I am assuming, your Honor, his testimony will relate to the retainers and the letter and the other exhibit just read to the jury. If my assumption is incorrect of course, then your Honor is entirely right in your attitude.

The Court: You might have a good objection to some question but not to a line of inquiry. I understand your point, Mr. Singer. I understand Mr. O'Hara's point too. Let us proceed with this witness to a point at which Mr. Singer wishes to make a specific objection to a question. At that time we will argue that in the absence of the jury.

Mr. Singer: Fine.

The Court: All right, go ahead, Mr. O'Hara.

Direct examination.

By Mr. O'Hara:

Q. Mr. Greenberg, where do you reside?
A. 1016 East 23rd Street, Brooklyn.
Q. What is your occupation or profession?
A. Certified public accountant.
[fol. 415] Q. How long have you been a certified public accountant?
A. About 16 years.
Q. How long have you been engaged in accounting work?
A. About 30 years.
Q. Where do you practice your profession?
A. 350 Broadway, New York City.
Q. Under what name?
A. Joseph S. Greenberg.
Q. Do you practice alone?
A. No; I have a staff of approximately six men.
Q. Do you know a man by the name of Milton Hoffman?
A. Will you repeat that question?
Q. Do you know a man by the name of Milton Hoffman?
A. I do.
Q. Can you tell us approximately when you first met him?
A. I met him about eight or nine years ago, I believe, at one of the charitable functions that we attended. I have been active in charity work in Brooklyn, and his father is in the catering business, and at one time he asked me whether I would see if I can't get some business for his father.
Q. As a caterer?
A. As caterers, and he also told me that he was a tax consultant, and he gave me his phone number. I jotted down his name somewhere in one of the books, and from time to time he would come in and say hello to me.
Q. Did you know a man by the name of Julius Glover?
A. Yes, sir.
Q. And his wife?
A. Mrs. Glover.
Q. Did there come a time when you were engaged in a professional capacity by Mr. and Mrs. Glover?

A. Yes; I knew the Glover family for about twenty odd years. They lived in my neighborhood. We belonged to the same temple, we were on the same board, and sometime in 1950 he came to talk to me about some accounting work.

Q. What kind of accounting work was it that he came to you to talk to you about?

A. He told me that he had some tax investigations with the Federal and the State governments, and would I audit [fol. 416] his books and see what information I can come up with.

Q. That was tax evasion?

Mr. Singer: Now, I object to any conversation that this man had with the Glovers as not being binding and not being within the issues of this indictment.

The Court: I will sustain your objection to the conversations he had with the Glovers.

Mr. O'Hara: I didn't think I asked for a conversation. This man testified he examined books and records.

The Court: Let him testify as to what he did.

Q. Mr. Greenberg, I don't want you to testify to anything Mr. and Mrs. Glover may have said to you, only what you may know from an examination of records. This matter you were consulted about, did it involve tax evasion?

Colloquy Between Court and Counsel

Mr. Singer: I object to it on the ground that it is not within the issues of this case, calls for a conclusion on the part of this witness, and it is an attempt to establish some other offense not charged within the indictment, and it is incompetent, irrelevant and immaterial.

The Court: I will be glad to hear you argue that point and Mr. O'Hara, and we will let the jury have a ten-minute recess while we do.

(The jury left the courtroom.)

Mr. O'Hara: Mr. Greenberg, if you would like to step out, you may.

The Court: Yes.

(Witness temporarily excused.)

The Court: Let me ask, Mr. O'Hara: On what basis are you offering testimony about the transaction with the Glovers and the Clover foundation?

[fol. 417] Mr. O'Hara: Number one, your Honor, any testimony that is offered with respect to the Glovers or the Clover Foundation is offered as against all defendants, not as to particular defendants. We feel that quite clearly it is well within the charges laid in the indictment.

The question of the conspiracy, and whether this was another case in which this conspiracy operated, of course, at some point will be for the jury to decide.

Now, under the theory of the Witt case, it is the Government's contention that what existed here was a ring, a conspiracy ring, to fix tax cases. It is the position of the Government that assuming, for example, there were ten members of that ring, if in any particular case only six operated in connection with that case and the other four may not even have had knowledge of what was done, if they, in fact, had participated in the ring in other cases, they are equally guilty of what transpired in the case in which they themselves did not actively participate. It is on that basis that we offer it against all defendants, your Honor.

Now, also, these acts are in furtherance of the conspiracy itself as charged in the indictment.

The Court: All right, Mr. Singer, what is your objection?

Mr. Singer: So that we are speaking of the same matter, I assume that this testimony is offered more or less to follow the testimony which was adduced, or which the Government attempted to adduce, from the witness Davis at pages 2265 of the stenographic transcript, *et seq.*

I think that is where the testimony began. Am I correct?

Mr. O'Hara: I think so, Mr. Singer.

[fol. 418] Mr. Singer: As we heard the testimony from Mr. Davis, we are able to discuss it as if we knew exactly what the testimony would be. It would appear that this was an incident entirely unrelated to any of the other incidents in the case.

The Court: Unrelated to the Pattullo Modes or the Gotham Beef.

Mr. Singer: Well, I will point it out in another fashion.

As I read the testimony, the last act with respect to stopping criminal prosecution occurred in January of 1949. It was apparent from what I have been able to determine from what the witnesses have said that these two matters of Pattullo and the Gotham Beef case, in so far as any alleged corrupt acts may have been involved, with the exception of one other which is placed some time in February—that is an alleged payment of $40,000—had been fully done, completed and that was the end of it.

So, here is an incident which according to the exhibit occurred on July 26, if my memory serves me correctly—I don't have the exhibit——

The Court: March 26, 1949?

Mr. Singer: 1950, some 16 or 17 months after the last event which we have in this case.

Now, I say that the testimony therefore is objectionable upon this ground: First it isn't an act within the meaning of the allegation, as I understand it, in this indictment. Second, when we moved for a bill of particulars we specifically asked for any other acts which the Government, or any other cases which the Government may claim a part of this conspiracy.

It is true that the Court denied our motion, as I understand it. In that I must differ with the recollection of some other counsel on my side of the table, but that is as I remember it. However, that left us in the position where as far as we were concerned for the defense, we were not [fol. 419] able to make any preparation with respect to this or any other similar situation.

Now, I must be frank to tell you that Mr. O'Hara very graciously furnished me with the name of the attorney who represented the Glovers at this time, and I must be frank to tell your Honor that with his consent, Mr. O'Hara's consent, I telephoned that attorney and I arranged an appointment.

Mr. Bennett, Mr. Corbin's partner and I interviewed or discussed the matter with Mr. Grossman, Bernard Grossman. That was some afternoon this week here after court, the very day when Mr. Davis testified. I don't know what day it was. And we sought an opportunity to talk to the Glovers. We were told that he would talk to them on the

phone and have them answer some questions that we might ask, and we did ask questions and he did report to us that he had some conversation over the telephone, and we were told the Glovers were leaving the following morning, and I will be frank with your Honor, that I asked that they remain, and the Government provided me with an opportunity to have them subpoenaed. However, that wasn't a matter that I felt that we could go into certainly during the trial, at least, when somebody we considered an important witness, Davis, was on the stand, and I had to undertake to cross examine him the next day. There were all of 2,000 pages delivered to me that I had to read. So we left the matter in that stage. I say that for background purposes.

Now, I say to your Honor that this testimony has only one purpose, to confuse the jury so that they will be diverted from the issue at hand. It is difficult enough, it seems to me, to follow the complicated transactions in this case [fol. 420] without involving the question of the merits or the lack of merits of another tax case involving several millions of dollars, I am told, involving a case where Glover, who later became a defendant in this court, was sentenced to a term of imprisonment on a plea of guilty. I have no way of knowing anything about it. I would say the least it would take would be two weeks of anybody's time to even develop a distant acquaintanceship with the facts. I am not prepared to do it, and I don't know whether we will be able to do it during the trial.

But aside from the fact of surprise, I say that the evidence is on a matter which occurred at least 15 months after the last act in this case. It may be true, the Government has been arguing here, that this is all one conspiracy. Of course, I don't think this is the proper place for me to argue that except in passing to say that even if this should be considered as part of the conspiracy involving the stopping of the criminal prosecution, it too would have been barred by the statute of limitations, because this occurred on August 3, 1950, which is more than three years before the date when the indictment was returned in this case which was in October 1954.

The Court: That is a question of law which you can argue at some time.

Mr. Singer: But I was pointing it out. So even to that extent it didn't extend the statute in so far as——

The Court: Of course, we cannot now decide the question of the statute of limitations which I know is an important matter in this case and on which I will be glad to receive memoranda from all parties.

Mr. Singer: In that connection I might point out to your Honor if I may that the Government in the argument of that motion on the statute of limitations conceded that the three-year statute applied to the first count of the in [fol. 421] dictment. That is clearly in the record. I will show it to you. And I think in the brief; but don't hold me to the brief, but I will show it to you.

The Court: That would be three years after the last overt act. We have to decide what the last overt act was.

Mr. Singer: I say that this has nothing to do with the allegations in the indictment in any way. It is clearly irrelevant, immaterial and certainly not binding on any of the defendants because it does nothing as far as I can see it, to establish the allegations of the indictment.

I might say differently, your Honor, if it were offered here, if there had been any attempt on cross examination—I just want to point out how absolutely the attorneys for the defendants were misled: I had a searching cross examination of Mr. Hoffman on any other tax matters. I could get no response with the name of any other matter. I don't want to reopen my cross examination of Mr. Hoffman with regard to this matter and I do not intend to. We had attempted to find the books and records from the examinations of these witnesses.

So we find ourselves confronted with this testimony, and it seems to me that it is clearly incompetent. It is so prejudicial, I think it would deprive this jury of a fair opportunity to simply, calmly and dispassionately consider the evidence in this case, and I might say to your Honor very frankly that we do not intend to examine the witnesses on the subject at all. We do not intend to cross examine because we will rely upon my objection and whatever other objections counsel have.

Now, I am making this application on behalf of my client and the other defendants, and I will point out in a certain

connection, so that your Honor need not be burdened with [fol. 422] repetition of it—your Honor has said that it was clear that the defendant Scherm and the defendant Steinberg were not involved in this transaction. You said so at page——

The Court: I said there was no evidence that Mr. Davis had connected them directly with it. Whether they are connected as conspirators is another matter.

Mr. Singer: No. Your Honor said at page 2273:

"Nothing so far said relates to Mr. Steinberg or Mr. Scherm."

And then you said again at 2282:

"Now, there is nothing in what has been said about the Clover Foundations or the Glovers which has any relevancy at all, as I see it, to Mr. Steinberg, Mr. Scherm or Mr. Bolich."

So that I might say that if they—unless you want to make it yourselves (addressing counsel)—I would make the specific objection that it is in no way binding on them and is not connected with them at all.

Now we go to the next proposition. That is, that it is at best an abortive situation. There was a retainer signed, there was a fee or check returned. I understand the check never cleared, but it was returned. The whole thing does nothing but complicate this issue and create an issue which we are required to meet under the circumstances I have outlined, and I believe it is entirely incompetent, irrelevant and immaterial.

Now, I go beyond that: Your Honor will note that there was no cross examination of the defendant Davis on the subject. The retainers were offered in evidence. All that does now is offer cumulative proof of a matter already before the Court, already before the jury concerning which there was no attempt to negative a single fact offered. So [fol. 423] that now we have proof, a lot of proof, assuming now they go through the whole Clover case, or what other proof they intend to add to it. I am sure that this will not help the jury decide this case, but it would rather confuse the issue, and upon all of the grounds I have urged, I believe that this evidence is inadmissible.

I don't want to object to each question——

The Court: I understand.

Mr. Singer: ——so it may be considered that I have objected to each question, and if your Honor does overrule it, you have overruled it, that I take an exception and I move to strike the answers out. And I tell your Honor that I intend to renew, and I say this purely because I did it before—I intend to renew the motion for a mistrial that I made at page 2287 of the typewritten record in connection with this testimony when and if it is offered.

Mr. Perry: Judge, I just want to amplify some of the remarks Mr. Singer made about Mr. Scherm.

Your Honor, this case I think presents the vice that the Supreme Court has so often spoken of, which is rambling——

The Court: We won't argue that.

Mr. Perry: No, Judge—to this extent: Saying something in an indictment is not a fact. They can allege anything they wish. They can claim anything they wish. What is fact is decided from the evidence produced before the Court. Your Honor mentioned the Krulewich case. I think I would like to draw your Honor's attention again——

The Court: I know that. I have run into a lot of these cases. I know exactly what you have in mind.

Mr. Perry: From Mr. Steinberg's point of view in the Gotham Beef case, I think it is clear that didn't involve the Ninth Avenue office——

[fol. 424] The Court: That is an argument you will have to make to a motion to dismiss or on your summation to the jury.

Mr. Perry: But let me bring my mind to this offer of testimony concerning this Clover Foundations: Here we are again in the situation where there is nothing which the Government has been producing so far which in any way ties them in. I heard your Honor say on other occasions that the proper order of proof in a conspiracy should be to show the conspiratorial agreement and show that the things that were accomplished were actually in furtherance of the conspiratorial agreement, and that has not been done here.

All we have been given, your Honor, are isolated sets

of facts which the Government claims were in furtherance of the conspiracy. That assumes facts which have not been produced.

Also, there is one other point of law that the Government has not stated to the Court: The fact that you do have a conspiracy, assuming there is one, doesn't mean that the conspiracy goes on endlessly, interminably until the end of time. In the Krulewich case——

The Court: Well, I know, I expect that I am going to have a lot of argument on all these points on the motion to dismiss, but here we are simply dealing with the question of admissibility.

Mr. Perry: On the question of whether or not any such testimony as they propose to offer should be admissible against Steinberg, because that is what the Government said it is offering it for, against all defendants.

Mr. Aranow: I would like to simply point out to your Honor that even if you admit the testimony of conversations had with conspirators, it is certainly not binding or proper under the rules of evidence as I have learned them, [fol. 425] and I studied them just a few years, to show what an accountant did who wasn't a conspirator, what another person whose name is Glover did, what books they kept. It is not binding upon us, and what the results of the accountant's examination of their books concerned is not binding on us under any theory.

The Court: I am inclined to agree with you on that. I don't think that is the point of the evidence. I don't understand that that is the point of the proposed evidence here.

Mr. Aranow: That is what he is trying to do. The question he asked particularly was did you examine the books of Mr. and Mrs. Glover and did you find——

The Court: I think that was a preliminary question. I think I understand what you have in mind then, Mr. Aranow.

Now in this case and at this stage of the case I have to be guided by what is alleged in the indictment, which is not proof, but which is a statement of that which the Government intends to prove, and which constitutes the framework of the issue. And the indictment alleges that the defendants combined and confederated with Hoffman, Davis, Schopick and various other people, divers other per-

sons to the grand jury unknown to defraud the United States in the exercise of its governmental functions of administering the Internal Revenue laws and of detecting and prosecuting violations of the Internal Revenue laws free from bribery, unlawful impairment, obstruction, improper influence, dishonesty, fraud and corruption. The indictment alleges further as part of the conspiracy that the defendants and co-conspirators Davis, Hoffman and Schopick would represent and cause to be represented to various persons that they and the law firm of Schopick & Davis [fol. 426] were specialists in income tax matters and that they had connections and influence with the Bureau of Internal Revenue in New York City and Washington, D. C. and could obtain for taxpayers special advantages and preferential treatment and consideration from said Bureau, and were able to influence officers and employees of the Bureau of Internal Revenue to make favorable dispositions of tax matters pending within the said Bureau regardless of the merits thereof. I do not construe this indictment as being limited merely to the Pattullo Modes case and the Gotham Beef case. It is an indictment alleging a continuing conspiracy from on or about January 1, 1946 and continuing, says the indictment, up to the date of the indictment.

Now, therefore, any evidence of facts which would tend in any way to support the allegations of the indictment is relevant evidence. Whether that evidence will be binding upon all of the defendants depends upon whether they are found by the jury to be co-conspirators and are bound by Acts of co-conspirators; but at this stage of the case we cannot, as a matter of law, decide that, nor can we at this stage of the case decide when the alleged conspiracy, if it existed, terminated so that we can pass upon the question of the statute of limitations.

In other words, we must take the evidence if it falls within the charges in the indictment and has some relevancy to those charges.

For that reason, I will overrule the objection and we will proceed.

Mr. Singer: To which we respectfully except.

The Court: Surely. All counsel have an exception.

[fol. 427] (The following took place in the presence of the jury:)

JOSEPH S. GREENBERG resumed.

The Court: I have overruled the objections of counsel. They have exception.

The stenographer will read the last question.

(The reporter read back the following question: "Q. Mr. Greenberg, I don't want you to testify to anything Mr. and Mrs. Glover may have said to you, only what you may know from an examination of records. This matter you were consulted about, did it involve tax evasion?")

A. It did.

By Mr. O'Hara:

Q. At the time that Mr. and Mrs. Glover retained you, did they have counsel?

A. No, sir.

Q. Did there come a time when you had anything to do with recommending counsel to them?

A. I did not exactly recommend. I had intended to introduce them to various men who I think were able to handle this matter.

Q. Did you make any arrangement for such an introduction?

A. I did.

Q. Whom did you speak to about that other than Mr. and Mrs. Glover?

A. I spoke to Mr. Hoffman.

Q. What conversation did you have with him in respect to that?

A. He came up to see me one day. I told him of the facts that I knew in this matter and asked him whether he would be able to handle this for our client. He said he would have to consult his associates, and after a few days, he came back to me and he said his associates are willing to go into this matter, but they want a $2500 retainer. I said I might recommend a $2500 retainer with the following understand

ing, that if my clients are not satisfied within a very short time, this retainer must be returned.

[fol. 428] Q. Following that conversation, was anything further done with respect to the matter?

A. He asked me to arrange an apopintment with my clients, which I did.

Q. For what date did you arrange that appointment?

A. It was Wednesday, June 28th.

The Court: What year?

The Witness: 1950, sir.

Q. Was there a meeting held on June 28, 1950?

A. There was.

Q. Where was it held?

A. It was held in my office.

Q. Will you tell us who was present?

A. Originally, I understood that Mr. Hoffman was coming in to meet my clients, but he brought two additional gentlemen with him. There was a Mr. Davis and a Mr. Halperin.

Q. Do you see the gentleman, Mr. Halperin, in this courtroom?

A. I do.

Q. Will you please tell us where he is sitting?

A. I believe it is the white-haired man in the first row.

Q. There is a number of seats in the front row.

A. I mean wearing a brown suit with glasses.

The Court: The record will indicate that the witness has identified Mr. Halperin.

Q. Who else was present on this occasion?

A. Mr. Davis, Mr. Hoffman, Mr. and Mrs. Glover.

Q. Will you please relate to us what transpired at that meeting?

A. After Mr. Hoffman introduced the gentleman to me, and not having met the two gentlemen before, I repeated the understanding with reference to the retainer, that I wanted it returned if my client is not satisfied. Mr. Hoffman spoke, or rather I asked the men in the room as to what their experience has been. Mr. Hoffman repeated that he and his associates had been accustomed to handle tax matters. Mr. Halperin said that he has contact. He should

be able to handle this matter satisfactorily. Mr. Davis joined in this conversation.

[fol. 429] Q. Did anyone say who or where these contacts were?

A. Mr. Halperin said they were in Washington.

Q. Was there a discussion about the case at all at this meeting?

A. I gave them some facts of the case. Of course, Mr. Hoffman had it originally and I assume that he gave his associates most of the information.

Q. Now, there were three gentlemen present, Davis, Hoffman and Halperin. Is that right?

A. That is right.

Q. Did any one of them speak more than anyone else at this conversation, or did they all join in, or how did it transpire?

A. It is my recollection that Mr. Hoffman started a conversation. Mr. Halperin was more or less the senior member of the firm; he led the conversation.

Q. Will you please go ahead and relate anything further that was said there that day with respect to this meeting?

A. After the discussion about the retainer was held, Mr. Halperin said, "Well, there will be an additional cash fees involved." At that time I got up, picked up my hat, walked out of the room and I told the gentleman, "I am not interested in that conversation" and never met them again. My clients and the other men remained in the room.

The Court: You had no further conversation?

The Witness: No, sir.

Mr. O'Hara: That is all, your Honor.

The Court: Any cross examination?

Mr. Singer: No cross.

The Court: No cross examination. You are excused.

(Witness excused.)

Motion for Mistrial and Denial Thereof

Mr. Singer: I renew the motion for a mistrial made and for the withdrawal of a juror upon all the grounds I urged in my discussion in the absence of the jury.

The Court: Your motion is denied and all counsel have an exception.

Next witness.

[fol. 430] VINCENT J. CLAYTON, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination.

By Mr. MacMahon:

Q. Mr. Clayton, where are you employed?

A. I am employed as a special agent of the Bureau of Internal Revenue.

Q. How long have you been a special agent of the Bureau of Internal Revenue?

A. December, 1945.

Q. Were you such in the years 1946, 1947, 1948, 1949—since the year 1946?

A. Yes, sir, I have been continuously employed.

Q. Did there come a time in the course of your duties when you heard of a case called the Pattullo Modes case?

A. Yes, sir.

Q. Could you tell me the circumstances under which you first heard that?

A. In early February of 1948, I was called into the office of my group chief, James Dowling. I was introduced to Revenue Agent Harry Scherm. I was told by Mr. Dowling that Mr. Scherm was bringing down from his office a case on Pattullo Modes which he had been examining one of the income tax returns, and that during the course of the examination he had detected evidence of fraud.

Q. Did you have any talk with Mr. Scherm after that?

A. Yes, we went into my own office, and I had a short oral discussion with Mr. Scherm about the nature of the case, the nature of the omissions of income.

Q. And did Mr. Scherm have any papers with him that he gave you?

A. Yes, sir.

(Government's Exhibit 50 marked for identification.)

Q. I show you Government's Exhibit 50 for identification and ask you if you can tell me what it is without reading it (handing). Are those the papers he had?

[fol. 431]

A. This Treasury Department letterhead is the paper he brought down with him.

Q. This document (indicating)?

A. Yes, sir.

Q. And the little slip on the top, could you identify that, please?

A. The little slip on the top is an assignment slip prepared by my group chief for the front office files indicating the case had been assigned to me for investigation.

* * * * * * *

Q. Would you state your conversation with Scherm at this time?

A. Mr. Scherm advised me that certain corporation income had been omitted from the income tax returns. It consisted of sales which had been made principally to a company in Brooklyn, Loehmann's, and the sales had not been entered on the corporation records, nor had they been included in the corporation income tax returns, and the corresponding checks received from Loehmann's had been made out to the order of the individual taxpayers, who were officers and directors of Pattullo Modes, and the checks were negotiated through the individuals' accounts.

Q. What did you do after your talks with Agent Scherm?

A. I made a few preliminary inquiries in the form of letter to other Government agencies for information with respect to the bonds that were purchased by the individuals that I knew at that time were associated with the corporation. I visited a local credit agency to get some financial background on the corporation. I stayed within the province of the Government offices with the exception of one local credit agency.

Q. Now, did there come a time when you commenced a full field investigation?

A. In late July of 1948.

Q. Will you tell me what a full field investigation of fraudulent income tax evasion consists of?

A. It would consist of communicating with the customers

of the taxpayer to determine the extent of business that had [fol. 432] been transacted between them, determine the nature of payments that had been made. It would consist of visiting the various banks, brokerage houses, insurance companies or any other persons or institutions or organizations that had any financial transactions with the corporation or the individuals concerned.

Q. Where the tax evader is a corporation, is there anything else that you normally do or can do?

A. Yes, we can compel the production of their books and records through a Commissioner's summons.

Q. You say you commenced this investigation in July of 1948. What did you do?

A. With Special Agent John Reechia, I visited Loehmann's on Bedford Avenue in Brooklyn. I introduced myself to Mrs. Loehmann and her son, William, identified myself, and stated that I wanted to review their records to determine what payments they had made to Pattullo Modes, Incorporated or to the individuals who were associated with the corporation. We were escorted to the bookkeeping department, and we began a scrutiny of the records of Loehmann's to determine what check payments had been made either to the corporation or the individuals.

We tabulated those checks, and upon the conclusion of the tabulation, we requested Mrs. Loehmann and her son to make available to us the checks and the related invoices. That took several days for them to dig them out, and upon receiving a telephone call from the chief bookkeeper, I went there to Loehmann's, took the checks and the invoices that I wanted, and left a receipt for them, and brought them back to my office.

Q. I want to go back for just a moment to this full field investigation where you mentioned communications with customers. Is that what is referred to as circularization generally?

A. Circularization is only one phase of a full field investigation.

Q. But what does circularization mean?

A. Communicating with the customers and obtaining [fol. 433] from them, from their records, the extent of the business that had been consummated between them and the taxpayer.

Q. You say you went back to Loehmann's to pick up some records. Do you know about when that was?

A. That was in the very early part of August in 1948.

Q. After you were over to Loehmann's, did you return to your office at 253 Broadway?

A. Yes, sir.

Q. Would you state what happened then?

A. My group chief, Mr. Dowling, came in and told me that he had been advised by Mr. Bolich that a status report was required.

Q. What is a status report?

A. A status report is a summary of the results of the investigation to that date, what has been discovered, the extent, who is involved.

Q. Did you make such a status report?

A. Yes, sir.

(Government's Exhibit 51 marked for identification.)

Q. I show you Government's Exhibit 51 for identification and ask you what that is (handing).

A. This is the memorandum that I wrote that constitutes my status report of Pattullo Modes, Inc.

Mr. MacMahon: I offer it in evidence.

* * * * * * *

(Government's Exhibit 51 for identification received in evidence.)

Mr. MacMahon: May I read it to the jury, your Honor?

The Court: Yes.

(Mr. MacMahon read Government's Exhibit 51 to the jury.)

Q. Mr. Clayton, with reference to this report, I notice that the top line says that the case was referred to your office on February 3, 1948?

A. Yes.

[fol. 434] Q. Is that the first time you had ever heard of Pattullo Modes?

A. That is, sir—February 13th.

Q. Is this the first time you ever heard of them?

A. Yes.

Q. The last sentence in that paragraph, "In accordance with administrative regulations, Revenue Agent Scherm stopped his examination and notified this office," to what time are you referring there in that sentence?

A. At that time I did not know when Revenue Agent Scherm had stopped his examination. I was under the impression that it had been a reasonably short period of time before he brought the case to my office.

Q. But, in any event, it was not referred to your office until February, 1948. Is that right?

A. That is correct.

Q. And Scherm did not refer to you at any earlier time?

A. No, sir.

Q. On your initial step in the investigation of the Loehmann's records, did you come to any conclusion at that time with respect to the merits of this case for criminal prosecution?

A. Yes, sir. It appeared to me that I had a prima facie case on that information alone.

Q. Did you receive any other information at or about the time of this status report from anyone in your office with respect to this investigation?

A. Yes, sir, the next communication I had was also from Mr. Dowling. He came in and verbally advised me that he had been told by Mr. Bolich that I was not to communicate with third parties, that the taxpayers were going to cooperate with the Government, and make available the information revolving around the attempted evasion of income taxes.

Q. About when did you receive those instructions?

A. Very shortly after I submitted that memorandum, still in August of 1948.

Q. What was the effect of those instructions on your investigation?

A. The investigation was stopped. There was no more investigation.

[fol. 435] Q. Is it necessary where you have a corporate taxpayer to get their cooperation?

A. No, sir.

Q. That is, you can subpoena their books and records. Is that right?

A. That is so. We could issue a Commissioner's summons which calls for the production of the corporate records.

* * * * * *

Q. What did you do after you received these instructions that you were not to contact any third party?

A. Well, in view of the statement that I was also to receive the cooperation of the taxpayers, I called Mr. James Saver, who was one of the individuals appearing on the power of attorney, and I requested the opportunity to start working on the books of Pattullo Modes. I also told him that in view of the fact that they were going to give us cooperation, I also would want the full complete records of all of the individuals concerned with the corporation.

Q. What did Saver do about that?

A. Mr. Saver told me at that time that he would like to hold off on submitting any information because they were going to make a contention that a voluntary disclosure had been made.

Q. Did you make any other attempts to get the books and records?

A. On a number of succeeding occasions, I called Mr. Saver. I should say I called his office. Most of the times I did not reach him, I left word I called. On the few occasions I did speak to him, I repeated my request to start to work on the corporate and individual records.

Q. What did he do?

A. He kept deferring submission of the records, did not offer any opportunity for me to go either to his office or to the taxpayer's office and start to work on the corporate records and the individual records.

Q. So during this period, I take it you never got the books of the corporation or the individuals?

A. No, sir.

Q. You mentioned voluntary disclosure. Did anything happen in that respect in the Pattullo case, so far as you know, and if so when?

A. In very early November 1948, Mr. Saver appeared at the office with Mr. Maurice Smith, a certified public ac- [fol. 436] countant. Mr. Smith had been the accountant for

Pattullo Modes, and they submitted, or I should say Mr. Smith submitted, an affidavit in which he attested that he had made a voluntary disclosure to Mr. Scherm in 1947.

The Court: Up to that time you hadn't gotten the books?

The Witness: No, sir.

Mr. Aranow: When was that, November?

The Witness: Yes.

Q. Did you have any communication from Mr. Baradell at about that time?

A. Yes, after this hearing, in which Mr. Baradell interviewed Mr. Smith further on the affidavit, Mr. Baradell advised Mr. Smith that he did not believe that voluntary disclosure had been made, and he was not going to accept the contention as such.

Q. Who was Mr. Baradell?

A. Mr. Baradell was the special adviser to the special agent in charge.

Q. And the special agent in charge was Bolich. Is that right?

A. In November, I don't know because Mr. Bolich may have gone to Washington at that time. I don't know whether the position had been filled.

Q. Mr. Bolich had been the special agent?

A. He had been the special agent in charge.

Q. I think the evidence shows in here up to September 1, 1948. Who succeeded Mr. Bolich as agent in charge?

A. I believe Mr. Walter Murphy, who had been the assistant special agent in charge, acted as special agent in charge until some time in early 1949, when Mr. William Frank came on from the West Coast and assumed the position.

Q. Did you show the Smith affidavit to Scherm, or was it shown to him in your presence?

A. Mr. Schem was present with me when Mr. Baradell interviewed Mr. Smith, and Mr. Saver was present also. I believe Mr. Scherm did see the affidavit.

[fol. 437] Q. I show you Government's Exhibit 7 in evidence and I ask you if that is the affidavit of Smith which you showed to Scherm (handing).

A. This appears to be the same affidavit.

Q. Now, what did Scherm say about this voluntary disclosure?

A. Mr. Scherm denied the statements made by Mr. Smith that there had been any voluntary disclosure made to him during the course of the examination, and it was only when Mr. Scherm reappeared at their office on a follow-up that any statement at all was made.

The Court: That is what Mr. Scherm said?

The Witness: Yes, sir.

Q. And what did Mr. Baradell rule respect to voluntary disclosure?

A. Mr. Baradell ruled that there had not been a voluntary disclosure.

Q. After this voluntary disclosure which was turned down by Mr. Baradell, did you make any other effort to get the Pattullo books?

A. Yes, sir. I called Mr. Saver on at least one other occasion and advised him in view of Mr. Baradell's ruling I would like to start to work on the corporation and individual records. He put me off again. I don't recollect the particular reason for it. I believe he said he wanted to go to Washington or some such thing, but he did not produce the records.

Q. What did you do about it?

A. I called Mr. Scherm up and made an appointment to meet him uptown and with Mr. Recchia, in company with myself, I met Mr. Scherm uptown. We went to the office of Pattullo Modes, Incorporated. I announced myself to the receptionist, stated who I was, and that I would like to see one of the officers. Immediately Mr. Marks came out. Mr. Marks was the secretary of the corporation. I identified myself to him, told him our purpose was to start the examination of the corporate, personal records, and I would like to get started right then.

[fol. 438] Q. About when was this?

A. That was November 19, 1948.

Q. Up to that time had you been told by anyone of any promises made to these taxpayers by any Government official that they would not be prosecuted if they cooperated?

A. No, sir.

Q. Now, did there come a time when Mr. Scherm prepared an affidavit in connection with the voluntary disclosure?

A. Yes, sir. After the appearance of Mr. Smith and Mr. Saver in Mr. Baradell's office, Mr. Baradell told Mr. Scherm that he would like to have an affidavit with respect to his knowledge of all of the events preceding his appearance at Pattullo Modes in 1947. And Mr. Scherm and I then went down to my office and drafted an affidavit in which he recited the history of the events starting with the time he was assigned the corporation's income tax return for 1944, I believe, the appointment with Mr. Smith to start his examination, the dates he was in the corporation premises examining the corporate records, the date that he submitted his draft, draft of his report. He had brought down with him certain documentary material from his office which substantiated these dates of assignment, submission of reports. He brought with him records with respect to having gone on sick leave, and he also brought down with him some record with respect to the receipt in his office of a 917 which had been dispatched by the Internal Revenue Agent in charge of the Brooklyn office.

(Paper marked Government's Exhibit 52 for identification.)

Q. I show you Government's Exhibit 52 for identification and I ask you if that is the affidavit which Scherm prepared and executed?

A. Yes.

Q. That was executed in your presence?

A. Yes. I executed the jurat on this affidavit.

Q. Did Mr. Scherm sign in your presence?

A. Scherm signed it in my presence.

[fol. 439] Mr. MacMahon: I offer it in evidence.

Mr. Singer: What is the date of it?

Mr. MacMahon: The jurat, the 13th day of December, 1948.

Q. Now, did you have any other conversations with Scherm during the month of October and November relative to the Pattullo case?

A. Yes, sir. In November I recollect that I told Mr. Scherm that there appeared to be some unusual maneuvering going on behind this case and that he should never forget it.

Q. Now, when you arrived on the premises of Pattullo Modes did you see anyone else there within a short time after you talked with Marks?

A. Yes. We were escorted to a section of the showroom, and very shortly thereafter Mr. Davis appeared. He identified himself to me, which was the first time I knew he wasn't part of the office of Schwaeber & Saver.

He started to tell me what they were going to reveal to us in the way of what had been omitted corporate income, the various mechanics employed. He also stated that the taxpayers had engaged the accounting firm of Weisberg & Greenstein to make a comprehensive audit of the corporate and personal records which would disclose the extent of the evaded income, the extent by which the individuals had benefited from it, and all of that was to be made available to us for any checking or verification that we could do.

Q. Now, did Davis tell you in a general way how the Pattullo people had evaded taxes?

A. Yes, sir. He said there had been corporate sales made to Loehmann's. The corporate sales had not been recorded on the corporation records nor included in the tax returns, that the proceeds derived from those sales were in the form of checks drawn either to the order of the individual taxpayers or to cash; that there had been other corporate sales omitted, and the corresponding checks received had been credited to loans payable account rather than to accounts receivable, which would have been more [fol. 440] correct; that there had been still another category of corporate sales made and the checks when received were deposited in the corporate bank account; but during that same month corresponding withdrawals were made from the bank, and neither the deposits nor the withdrawals had been entered in the corporate records. He also men-

tioned to me at that time that another form of income not reported was what he referred to as Saturday sales.

Q. During the month of November did you examine the books of Pattullo and have other conversations with the Pattullo people and Davis?

A. Yes, sir. From November 19th on for quite a few succeeding days thereafter we continuously examined the records of the corporation and also the individuals.

Q. You say "we"; who was "we"?

A. Special Agent Recchia and Mr. Scherm.

Q. Did you receive net worth statements from the Pattullo principals?

A. About the middle of December I received net worth statements for Mrs. Segel, Mr. Zipser, Mr. Cohen and Mr. Marks.

* * * * * * *

Q. Now, did there come a time when the taxpayer signed statements?

A. Yes, sir.

(Papers marked Government's Exhibits 53 for identification, 54 for identification and 55 for identification.)

* * * * * * *

Q. And I show you Government's Exhibit 6 in evidence and ask you if you can tell me what that is.

A. This is an affidavit made by Morton Marks in my office to me on January 4, 1949, on which I executed the jurat.

Q. And I show you Government's Exhibit 13 in evidence and ask you to state what that is.

A. This is an affidavit by Marjorie Segel given to me in my office on January 4, 1949, on which I executed the jurat.

* * * * * * *

[fol. 441] AFTERNOON SESSION.

VINCENT J. CLAYTON resumed the stand.

The Court: Have the defendants any objection to those exhibits that were submitted to them?

Mr. Gottesman: No objection.

The Court: All right. The exhibits will be marked in evidence.

Mr. MacMahon: The first one, your Honor, is 52 for identification, which is the Scherm affidavit.

(Marked Government's Exhibit 52 in evidence.)

Mr. MacMahon: 53, 54 and 55.

(Government's Exhibits 53, 54 and 55 for identification received in evidence.)

* * * * * *

Direct examination.

Resumed by Mr. MacMahon:

Q. I notice, Mr. Clayton, that these statements, Government's Exhibits 53, 54 and 55 are all dated January 4, 1949. Up to that time had you been advised by anyone that any governmental official or anyone in the Internal Revenue Bureau had made any commitment not to prosecute the Pattullo tax case?

A. No, sir.

Mr. MacMahon: Your Honor, there are five of these and they are substantially identical, although not quite identical.

* * * * * *

Q. Now, after these statements were given to you did you have an opinion as to whether this case was one for criminal prosecution?

A. Yes, sir, I did.

Mr. Singer: Objection on the ground it calls for a conclusion.

Mr. Aranow: Objection.

[fol. 442] The Court: I will overrule the objection. The witness has said he did have an opinion.

Q. Did you have such an opinion?

A. I did have such an opinion.

Q. What was your opinion?

A. My opinion was that the case was well in line to go forward to prosecution.

The Court: Was that part of your function, to determine whether or not a case should be recommended for criminal prosecution?

The Witness: Yes, your Honor. In every case that is handled by a special agent he has to make a recommendation as to the disposition of the case.

The Court: Go ahead, Mr. MacMahon.

Q. Now, do you recall any event on the day following the time you obtained these affidavits? That would be on January 5, 1949.

A. Yes, sir. I received a telephone call that Mr. Baradell wanted to see me in his office. I went up there and he told me——

Mr. Singer: I object to anything Mr. Baradell said as not in the presence of the defendants, pure hearsay and not binding on them.

The Court: I will take it subject to connection, and if it isn't connected I will strike it out. Go ahead.

Q. Go ahead.

A. Mr. Baradell told me he had received a telephone call earlier that day from Mr. Bolich.

The Court: Now, wait a minute. Where is Mr. Baradell?

The Witness: Mr. Baradell is in his office in New York.

Mr. MacMahon: He will be here, your Honor. I will produce him as a witness and he will be subject to cross examination. I submit in this connection that these are [fol. 443] official acts within the Bureau of Internal Revenue.

The Court: I am not going to let this witness testify as to what Mr. Baradell told him Mr. Bolich said. That would be hearsay. I will let him testify what Mr. Baradell's instructions were directly to him. I am not going to let him testify as to a conversation with Mr. Bolich.

Q. What were Mr. Baradell's instructions to you?

A. Mr. Baradell's instructions to me were to write my report as I wished. If I wrote a report recommending criminal prosecution, he would be compelled to overrule me.

The Court: Don't tell us what he said Mr. Bolich said to him, but did he give you any reason why he would be compelled to overrule it?

The Witness: Yes, sir, he based that instruction to me upon a telephone conversation he had with Mr. Bolich earlier that day.

Mr. Corbin: I move to strike it out on the same grounds urged against the reception of the conversation.

The Court: That motion is denied.

He is testifying there as to what Mr. Baradell told him, not what the conversation was between Mr. Baradell and Mr. Bolich. So your motion is denied and you have an exception.

Mr. Corbin: Personally, I don't see the distinction.

The Court: One is direct testimony and the other would be hearsay testimony of a conversation with somebody else.

Q. Mr. Clayton, at that date, January 5, 1949, had you submitted any other information to Mr. Bolich directly other than the status report which you submitted to him, dated August 6, 1948?

A. No, sir, I had not.

[fol. 444] Q. Had you submitted your file to Bolich, your file on the investigation?

A. No, sir.

Q. Had you submitted your file to Baradell?

A. No, sir.

* * * * * *

Q. Was your investigation complete on January 5, 1949?

A. Not in my opinion.

Q. After this conference on January 5, did you have any further conversations with anyone else in the Internal Revenue Bureau?

A. Yes, sir. On the 10th of January, 1949, I went to Mr. Baradell's office with Mr. Dowling early on that day. Mr. Baradell repeated to Mr. Dowling in my presence——

Mr. Corbin: I object to it as hearsay.

The Court: Mr. Baradell said something to you there, did he?

The Witness: Yes, sir, he talked to my group chief in my presence.

The Court: What did Mr. Baradell say? Don't quote what Mr. Baradell said somebody else told him.

Q. What Mr. Baradell said in your presence.

Mr. Corbin: Same objection.

The Court: Objection overruled.

Mr. Corbin: Exception.

A. Mr. Baradell told Mr. Dowling that he had had instructions that the case should not go forward for criminal prosecution, and that I still had my right to write any type of report I wished on the case, but that if I did write a prosecution report, he would be compelled to overrule me.

The Court: He told that to your superior?

The Witness: He told that to my immediate superior.

[fol. 445] Q. Did he say who had given him those instructions?

A. Yes, sir.

Mr. Corbin: May I have an objection to all this line?

The Court: You have an objection and it is overruled, and you have an exception.

The Witness: Yes, sir, he based that same line on the instructions he stated he had received from Mr. Bolich.

Q. Did you have any further conference with Baradell?

A. Later in that day, there was a conference, which was attended by the four officers of Pattullo Modes—Mrs. Segel, Mr. Zipser, Mr. Cohen and Mr. Marks—Mr. Davis, Mr. Saver, Mr. Scherm, myself and Mr. Baradell. It was held in Mr. Baradell's office.

Q. What was said there?

A. Mr. Saver reviewed the fact that he had been down to Washington and had discussed this matter with Mr. Bolich, and that they had received a commitment of no prosecution. Mr. Baradell then talked to the taxpayers. He advised them that they had been guilty of a crime; because of consideration being given outside of our own office, they were not going to be prosecuted, but they should realize that they were being freed of the responsibility of going to jail on account of this alleged crime, and that

they should make every effort to pay the civil responsibilities, the civil taxes and penalties.

Q. Was the word "double cross" used at that conversation?

Mr. Corbin: Objected to as leading, suggestive and improper.

The Court: I will overrule you.

Mr. Corbin: Exception.

A. Yes, sir.

Q. Would you tell me in what connection? Tell me the conversation.

A. It was in connection with a conversation or that part [fol. 446] of the conversation which related to the fact that the Government would be using in a prosecution case evidence which had been supplied by the taxpayers through their representatives, and that in effect it would be a double-cross.

The Court: How did that come up? Who said it?

The Witness: Mr. Baradell.

The Court: Mr. Baradell said that?

The Witness: Yes.

Q. What if anything further were you to do with the Pattullo case following that conference with Baradell?

A. I had been instructed earlier that day to continue to work with the revenue agent until the case was completed.

Q. Who gave you those instructions?

A. Mr. Baradell.

Q. What did he say?

A. He said that we should stay in the case to insure that the civil penalties were imposed and that they were not taken off at any further stages in the processing of the case.

Q. Did you have any conversation with Scherm while you were doing that work?

A. Yes, sir, I had many conversations with Mr. Scherm.

Q. Did you have any conversation with Scherm with respect to what had happened at 253 Broadway?

A. Yes, sir.

Q. Would you state what that was and about when you had that conversation?

A. After the January conferences, I indicated to him that somebody must have been pretty well fixed to have taken care of that case so directly——

Mr. Corbin: I move to strike it out.

Mr. Singer: I object to that.

The Court: Is that what you said to Mr. Scherm?

The Witness: In substance it is, your Honor.

The Court: Motion denied.

Mr. Singer: I respectfully except.

[fol. 447] Q. What did he say?

A. I don't recall that he had any comment to make on it.

Q. Did there come a time when you made a report on the Pattullo case?

A. Yes, sir. In November, 1949, the revenue agent had finally resolved his figures. I did write a report in which I recommended no prosecution.

Q. What was the basis upon which you recommended no prosecution?

Mr. Corbin: Objected to on the ground that the paper speaks for itself.

Mr. Aranow: I object.

The Court: Is the basis set forth in the paper?

Mr. MacMahon: I think the objection is good, your Honor.

The Court: All right, I will sustain the objection if it is in the paper.

(Government's Exhibit 56 marked for identification.)

Q. I show you Government's Exhibit 56 for identification and I ask you if that is your report (handing).

A. Yes, sir, this is my report.

Mr. MacMahon: Your Honor, I would like your Honor to look at that. There are some markings that have been put on here since that report, and my offer will be to substitute clean pages where those markings are. (Handing to the Court.)

The Court: Do you want to show it to defense counsel?

Mr. MacMahon: I would like your Honor to look at it for a moment so that you will know what they are. You will notice certain underlining.

The Court: You are offering it except for these red pencil markings?

Mr. MacMahon: Red pencil markings, and there is some matter that has been put in quotes on I think the last page or the next to the last page.

[fol. 448] The Court: Show it to defense counsel. It is offered except for the pencil notations thereon, which were not part of the original report, obviously put on there after.

The Court: Do all counsel want to read that?

Mr. Aranow: I won't consent that it go into evidence unless I do. Counsel could have had copies of it made.

The Court: All right. We will take a five-minute recess until counsel have read it.

(Short recess.)

The Court: Any objection to the admission of it?

Mr. Aranow: Yes, I object to it on the ground that it is incompetent and irrelevant and immaterial, that it is based on part facts, part conclusions, based on no evidence, conclusions based on statement made by third persons and not binding on the defendant Bolick.

The Court: Any other objection, or do other counsel concur in that objection?

Mr. Singer: We all concur in that.

The Court: Let me look at it.

Mr. MacMahon: Your Honor, could I ask a couple of questions just to qualify the admission of it.

By Mr. MacMahon:

Q. Mr. Clayton, is it part of the regular course of your business to make reports?

A. Yes, sir.

Q. And was this report made in the regular course of your business?

A. Yes, sir.

Mr. Aranow: I would call your Honor's attention to the last part of it. There are certain phrases which are ambiguous. Several meanings may be drawn therefrom. One meaning can be drawn which I believe is unfair and not proper, one conclusion.

[fol. 449] The Court: If there is anything ambiguous in there that can be brought out on cross examination. I will admit the document in evidence. The objections are overruled and you may have an exception.

Mr. Aranow: I respectfully except.

(Government's Exhibit 56 for identification received in evidence.)

Mr. MacMahon: May I read it to the jury, your Honor?

The Court: Yes.

Q. Did you have any talk with the special adviser about this report at any subsequent time?

The Court: Who was the special adviser at that time?

The Witness: Mr. Baradell.

The Court: Still Mr. Baradell. Go ahead.

A. Mr. Baradell called me up to his office about a week later, and he had manuscript papers in his hand, and he advised me that this manuscript represented a draft of a memorandum that he was going to prepare in explanation of his approval of the closing of the case. He read this to me and he stated there were two factors, one of which was the existence of the affidavit of Maurice Smith with respect to the alleged voluntary disclosure which, while he did not believe it, nevertheless, he pointed out that it was in existence and he did not know what other reviewing authorities might think of it; and, secondly, there was in existence the promise by Mr. Bolich that there would be no prosecution in exchange for cooperation on the part of the taxpayers.

Q. What was your conversation with him as to what you were to do with respect to that memorandum?

A. I don't remember that I was supposed to do anything with that.

[fol. 450] The Court: What was he talking to you about this draft of the memorandum for? What did he say?

The Witness: He told me solely that he was writing this memorandum in explanation of his approval of my recommendation.

The Court: He didn't ask you to do anything?

The Witness: No, sir.

Mr. MacMahon: That is all, your Honor.
The Court: You may cross examine.

Cross examination.

By Mr. Bennett:

Q. So we understand, Mr. Clayton, at no time did Mr. Baradell ask you to change a word of your report?

A. No, sir.

Q. As a matter of fact, he had told you on several prior occasions to write any kind of a report you wanted to, didn't he?

A. On no more than two occasions.

Q. At least two?

A. On no more than two, sir.

Q. You wrote this report some eleven months after he had first told you to write any kind of a report you wanted to, November, 1949?

A. That is right.

Q. Did you intend it to be an honest report?

A. Certainly.

Q. You did not intend to curry favor with any superior officer?

A. No, sir.

Q. Did you intend to go along with any fix that you thought might be in it?

A. I didn't intend to go along with any fix that might be in it or might ever develop thereafter.

Q. Your thought that you intended to express was that if anyone in authority had given an assurance of no criminal prosecution in return for cooperation, that assurance should be adhered to. Is that right?

A. I don't understand that.

Q. Was it your feeling and intention to express in that report that the Government should not double-cross any- [fol. 451] body by going back on a promise of no prosecution?

A. No, sir.

Q. Wasn't that why you recommended no criminal prosecution, because you thought and had been advised that a commitment of no prosecution had been given in return for cooperation?

A. No, sir, that is not why I wrote a no-prosecution report.

Q. Didn't you say in that report that you recommended no prosecution in view of the recommendation by higher authority that there be no prosecution?

A. Yes, sir.

Q. And you understood that that had been given on assurance of cooperation by the taxpayers?

A. I am sorry?

Q. I say you understood that that assurance of no prosecution had been given in return for a promise of cooperation by the taxpayers?

A. That is what I was told.

Q. So that you agreed with Mr. Baradell's view that if there had been a promise of no prosecution in return for cooperation, the Government should not prosecute after they had received cooperation?

A. I didn't agree with Mr. Baradell's view, because to my knowledge Mr. Baradell never expressed his view to me.

Q. Didn't you say just a few moments ago that either Mr. Dowling or Mr. Baradell had reported to you that there would be no prosecution in view of the assurance of cooperation from the taxpayers?

A. That is not the same.

Q. Weren't you called into Mr. Baradell's office at sometime back in November, December or January, together with your group chief, to discuss this matter?

A. We were called up and told. There was very little discussion.

Q. When was it that the words "double-cross," as Mr. MacMahon called it, were used?

A. I believe that expression was used on the 10th of January.

Q. Was that the occasion when the taxpayers were all down in the office?

A. That is correct.

Q. And who used those words?

A. It is my recollection Mr. Baradell used them.

fol. 452] Q. Did he in substance say that it would be double-crossing to go back on an assurance of no-prosecution given in return for cooperation?

A. In substance, yes.

Q. So that if and when the taxpayers had cooperated it was your view, I take it, as well as his, that it would be a double-cross if the Government thereafter tried to prosecute?

A. No, sir, you have misunderstood me somewhere along the line. It was not my view.

Q. You say your report in November of 1949 was an honest report?

A. Yes, sir.

Q. It was not intended to go along with any dishonest plan?

A. If I had known that any dishonest plan had existed, I would have written a different report.

Q. And you said in that report that in view of the assurance of no prosecution, you recommended no prosecution, right?

A. No.

Q. I will read to you from page 7 of the report: "However, in view of the commitment by higher authority for no-prosecution consideration of this case, criminal prosecution is not recommended." That was your statement there, was it not?

A. Yes, sir.

Q. Do you mean to tell us that even where a commitment for no prosecution is given in return for cooperation, you would favor criminal prosecution?

A. I am sorry, sir?

Mr. Bennett: Would the stenographer read the question.

(Question read.)

The Witness: I would, sir, if there was any way I could effect it.

Q. Then you are in favor of criminal prosecution even though the head of your department or the Government promises the taxpayer that they won't prosecute them in return for this cooperation. Is that right?

A. It is my recommendation, sir, not the head of my office.

[fol.453] Q. Do you mean you recommend to the head of the office that he go back on a governmental promise given

to a taxpayer? Is that the kind of treatment of taxpayers that you recommend?

The Court: Now, read the first part of that question.

(The reporter read back the following: "Q. Do you mean you recommend to the head of the office that he go back on a governmental promise given to a taxpayer?")

The Court: You can answer that.

A. If I believe that a successful prosecution would result on the facts available in any case, regardless of commitments made, I would recommend prosecution.

Q. So that even if the Government promises immunity for cooperation you say, "Throw that promise out the window and prosecute," right?

A. That is what I say, yes, sir.

Q. Mr. Baradell did not agree with any such attitude, which he characterized as a double-cross, didn't he?

A. His expression.

Q. Your function in the department is that of an investigator, is it not?

A. Yes, sir.

Q. You go out and acquire facts and then you pass them along to your superiors in the department. Is that right?

A. Yes, sir.

Q. With your view or recommendation on it?

A. That is right.

Q. The actual decision as to when or how or in what way to proceed is made by higher authority, is it not?

A. The responsibility for the original recommendation is that of the investigating agent. What happens thereafter is beyond his control.

Q. Exactly. Your responsibility is for the investigation and your recommendation on those facts, right?

A. That is right.

[fol. 454] Q. And if you see that a taxpayer has done acts which constitute a fraud, you automatically recommend prosecution, right?

A. If all of the facts warrant it.

Q. Yes. If the taxpayer had been guilty of fraud as you see it, you recommend prosecution?

A. Yes, sir.

Q. Now, you know that in a great many cases in your experience, and in the experience you have had in discussing matters with other agents, there have been many cases where agents have reported fraud and recommended prosecution and yet higher authority had compromised the matter with the taxpayer, isn't that right?

A. That is correct.

* * * * * * *

Q. Now, when was it you first heard about this case?

A. February 1948.

Q. Was that the same date referred to in an assignment slip that has been put in evidence, February 13th?

A. That is correct, sir.

Q. You then talked over the matter with Revenue Agent Scherm?

A. Yes, sir.

Q. Did Mr. Scherm show you various papers and data, information that he had?

A. He had various work papers, yes, sir.

Q. You were familiar with the fact that he had already been over the corporate books, were you not?

A. For one year, sir.

Q. 1944 or 1945 I think you said?

A. That is my recollection, that he had examined the year 1944.

Q. But not 1942, 1943 or 1945?

A. I don't believe at that time he had touched them.

Q. Now, you knew at that time that all you had to do was to call for these corporate books and you could see them, didn't you?

A. I could have called for them. In order——

Q. Assuming that a subpoena was obeyed you would have them?

A. In order to have issued a summons I would have [fol. 455] had to receive permission from the front office in accordance with the office regulations in vogue at that time, but I didn't wish to see them at that time.

Q. You didn't want to see the books then?

A. Not right then, sir.

Q. You really didn't care what was in the corporate books at that time, did you?

A. Because I had two other reports I was writing in the office which were of greater importance at that time.

Q. On other matters?

A. Yes, sir.

Q. I am talking about the Pattullo case.

A. I had no time for the Pattullo case at that time.

Q. And even if you did have time you didn't care what the books said at that time?

A. Yes, sir, I would.

Q. You know you could go through whatever routine was required to get permission to issue a subpoena and get the books and look at them?

A. I don't know whether I could have gotten permission, sir. I could have requested permission.

Q. Has permission ever before been denied to you to issue a subpoena for books?

A. Permission to issue a summons requesting an individual to appear in my office had been denied.

Q. Now, you understood my question, didn't you?

A. Yes.

Q. You understood that it applied to books of this corporation?

Mr. MacMahon: Your Honor, I submit the question did not——

The Court: You asked a general question. The witness didn't answer it. So repeat your question.

Q. Didn't you understand that I was asking you about books of the corporation?

A. No, sir, I did not.

The Court: Repeat the question.

[fol. 456] Q. Had any request of yours prior to February 1948 for permission to issue a summons for the books of a corporation taxpayer ever been refused?

A. No, sir.

Q. Now, from February 1948 to August of 1948 did you make any request for permission to issue a summons for the corporate books?

A. No, sir.

Q. But you knew that when this taxpayer was making sales to Loehmann's and not putting them on the books that you had real grounds for suspicion of fraud?

A. Yes, sir.

Q. So that what you were concerned with between February and August was in rounding up evidence of unrecorded sales and transactions which would not be on the books or would not be properly reflected on the books, isn't that right?

A. No, sir. I took no steps with respect to Pattullo Modes outside of routine inquiries until the end of July.

The Court: Because you were busy on other matters?

The Witness: That is correct, your Honor.

Q. Well, then, you say now you were busy on other matters; it wasn't that anybody held you up or prevented you from inquiring from February to July?

A. Nobody took any action between February and July.

Q. Do you recall the conversation you had with Mr. Dowling your group chief when he assigned you to the case?

A. I just recall he introduced me to Mr. Scherni whom he appeared to know, and that Mr. Scherni appeared to have a good case.

Q. Did he say, throw the case in the wastebasket or shelve it for a time or anything like that?

A. No, sir.

Q. Did he give you any instructions or hints by smirk or wink or anything of that kind, to give it the lost file treatment or anything like that?

A. No, sir.

[fol. 457] Q. You were to go ahead and make your regular investigation as an honest agent should, isn't that right?

A. Yes, sir.

Q. According to his instructions?

A. I received no instructions from him.

Q. Well, that was implied on your being assigned to the case, wasn't it?

A. I was assigned to investigate the case.

Q. And you knew that that was one of the requirements of the assignment?

A. Knew that what was?

Q. To do an honest investigation?

A. That goes without saying, I believe.

Q. The reason I asked the question, for your information, is that I thought I caught some hint of suspicion in this gap from February to August, some reference to not seeing the books. You have no suggestion to offer here that you were in anywise hindered, hampered or prevented from looking at the books or making your investigation at any time during this period from February to July or August whenever it was that you took action?

A. I wasn't hindered.

* * * * * * *

Q. In fact, you had only begun to work on it a couple of weeks before in July?

A. I went out into the field for the first time in July.

Q. In July?

A. Yes.

Q. Oh, you mean there was some work on the matter you had done prior to going out in the field?

A. Yes, sir. I had performed various routine matters which are fundamental to the commencement of any investigation prior to that time.

Q. Such as what?

A. Such as writing letters to determine the extent of land ownership by the individual taxpayers; such as reading credit agency reports; such as checking files, requesting information from other governmental agencies.

Q. Routine procedure?

A. Routine, yes.

[fol. 458] Q. You telephoned Mr. Saver, I guess it was?

A. Yes, sir.

Q. He didn't call you?

A. No, I called him.

Q. And where did you get his name?

A. His name appeared on the power of attorney which I had received earlier in that year.

Q. Up to that time in August had you discussed this case with Mr. Wheeler of the Ninth Avenue office?

A. I never discussed this case with Mr. Wheeler.

Q. When you called Mr. Saver, you were then interested in a more particular look at the taxpayer's books. Is that right?

A. When I called Mr. Saver, it was after I had been told that the taxpayers were going to cooperate. Not knowing what his interpretation of cooperation might mean, I called him with the intention of letting him know what I considered to be cooperation, which meant a complete disclosure of everything.

Q. You considered cooperation walking into court somewhere and pleading guilty before they had been indicted?

A. Yes, sir, I will take that answer.

Q. Because you didn't believe the Government should even keep its promise to a taxpayer when it gave them immunity? Is that right?

A. I don't think there had been any promise made at that time. I didn't know of it.

Q. But you were told about this cooperative attitude of the taxpayer back in the beginning of August?

A. I was not told of a cooperative attitude. I was told the taxpayers wanted to cooperate.

Q. And you didn't consider that any evidence of a cooperative attitude?

A. No, sir.

Q. So you called Mr. Sayer to tell him what you thought cooperation should be?

A. That is right.

Q. Did you explain to him in detail the full extent of your attitude or theory on cooperation?

A. No, sir. I let him know what records I should like to start with.

Q. You just asked him for some records then. Is that it?

A. I asked him for all of the corporate books, basic [fol. 459] records and supporting records, checks," invoices, sales stubs. I asked him for all of the records relating to the personal finances of the individuals of any kind whatsoever, including the members of their families.

Q. Anything else?

A. That covers it pretty well.

Q. Did you tell him that that was your idea of cooperation?

A. No, I didn't tell him that was my idea.

Q. Did you tell him you had been informed that the taxpayers were going to cooperate?

A. I told him I understood that the taxpayers wanted to cooperate.

Q. And it didn't occur to you at that time that the taxpayers were looking for consideration for their cooperation, did it?

A. It occurred to me that there was a reason for it, sir.

Q. So, shall we say that from about the first week in August on, you knew or had been informed that the taxpayers wanted to cooperate and had a reason looking toward consideration for their so doing?

A. I am sorry?

(Question read.)

The Witness: I had been told that they wanted to cooperate. I assumed they had a reason.

Q. And you didn't think that reason might be connected with possible criminal prosecution?

A. No, sir.

Q. Now, when you talked with Savor, did he say he would not cooperate with you?

A. No, he didn't say that.

Q. He said he was going off to Washington about something?

A. No; on that occasion he told me that they were going to make a claim that a voluntary disclosure had been made.

Q. And you understood that to mean also that they claimed they should not be criminally prosecuted, didn't you?

A. Well, it was the Treasury Department policy at that time that if a voluntary disclosure or if circumstances describable or acceptable as a voluntary disclosure existed, prosecution would be waived by administrative action.

[fol. 460] Q. So that you were perfectly familiar with the fact that there were certain circumstances under which the Treasury itself was willing to waive criminal prosecution?

A. There were certain circumstances, yes.

Q. You didn't agree with that policy, of course?

A. I didn't disagree with that policy.

Q. You had nothing to do with that?

A. That is exactly right, sir.

Q. By the way, what was the date of that talk with Saver?

A. It was about the 9th or 10th of August, 1948.

Q. So that the sum of your knowledge and information then was voluntary disclosure, cooperation, and some reason looking toward some consideration for the taxpayer. Is that fair?

A. No, sir. I had been told there was a desire to cooperate. I had been told that there was going to be a claim made of a voluntary disclosure.

Q. But, of course, you knew from the very fact that that voluntary disclosure was discussed with you that——

A. Just a minute, sir. I refuse to discuss voluntary disclosure on the telephone conversation with Mr. Saver because I had already been told—all of the agents had been told—that voluntary disclosures were outside of our province and belonged up in the front office. I did not discuss voluntary disclosure.

Q. So that the whole effect of a possible voluntary disclosure was something that you did not have authority to go into?

A. That is right.

Q. That, by the rules and regulations under which you were governed, had to be passed on by higher authority?

A. In my office.

Q. And I assume after your office's decision on it, by the Washington office. Is that right?

A. I wouldn't know about that.

Q. You don't know what happens to reports after they leave your office?

A. I know they are routed around. I don't know what happens to them.

[fol. 461] Q. You don't think that decisions of your office are reviewed and changed, modified or corrected in Washington?

A. They are reviewed.

Q. But you have no idea that they are ever modified or changed. Is that what you are telling us?

A. None of mine have ever been modified or changed, sir.

Q. Is that because you tried to conform them to what you think the decision will be in Washington?

A. I have no idea what the decision in Washington will be on any particular case.

Q. Were you trying to keep your record, your batting average, perfect in recommending no prosecution in this case?

A. No, sir.

Q. You talked to Saver about the 9th or 10th of August, right?

A. Yes, sir.

Q. You asked for books, and see if you can tell me just what he said.

A. He said in substance that they were going to make a claim for voluntary disclosure.

* * * * * *

The Court: The question is, and you correct me if I am wrong, Mr. Bennett: When you asked for the books and Saver then said they are going to make a claim of voluntary disclosure, what was the conversation then about the books? Was anything more said about the books?

The Witness: No, sir, I stopped there.

The Court: You didn't press for the books?

The Witness: No, sir; when a voluntary disclosure was in the consideration stage, we stayed clear.

Q. Then the reason, as I understand it, for inaction from then on was that you were waiting for some ruling on the question of voluntary disclosure?

A. I waited a while and then I called him again.

Q. If I understood your direct testimony correctly, you said or suggested that Mr. Saver kept putting you off and putting you off about the books?

A. Yes, sir.

[fol. 462] Q. You now say, as I understand you, that you

dropped the question of the books as soon as he mentioned voluntary disclosure. Will you straighten me out on that? What is the fact about it?

A. I waited about a month.

Q. You dropped the books for a month only?

A. Yes, sir.

Q. That gets us down to when, September?

A. About September.

Q. About September 10th?

A. I believe that is fairly correct.

Q. Nobody has refused up to now to give you any books. Is that right?

A. I haven't had the books up to now.

Q. Nobody has refused to give you any books, right?

A. I haven't had the books up to now.

Q. Nobody has refused to give you any books, is that right or wrong?

A. I have been put off getting the books.

Mr. Bennett: Will your Honor direct the witness to answer my question, please?

The Court: Did he refuse to give you the books?

The Witness: There was not an outright refusal, your Honor.

The Court: He put you off by saying they are going to make a claim of voluntary disclosure?

The Witness: That is right, and papers had to be prepared and they were going to come in, and things of that nature.

The Court: That was the only reason he gave for putting you off?

The Witness: That is right.

Q. Didn't you say a few minutes ago you stopped the question of the books as soon as he said voluntary disclosure?

A. On that day, August 10th or 9th, I did.

Q. And Saver didn't put you off?

A. Not on that day.

Q. You didn't talk to him until when after that?

A. About a month later.

[fol. 463] Q. And you didn't talk with him again until September?

A. I believe that is correct.

Q. About a month after the first conversation?

A. Yes.

Q. You did the telephoning on or about September 10th, the second conversation?

A. I believe I did.

Q. What did you ask him on that occasion?

A. I reminded him that I had called him earlier, and that I would like to start to work on the corporate records. At that time he told me that they were just about finished gathering the papers that they were going to submit to Mr. Baradell in connection with the voluntary disclosure.

Q. Did you say "Let me see the books"?

A. I told him I wanted to, but he asked to wait to see what happened to the voluntary disclosure.

Q. Was that agreeable to you?

A. I didn't object to it.

Q. Was your laying off the question then in accordance with rules and regulations of the Department?

A. I don't know of any rules and regulations that would have required me to have laid off.

Q. You wouldn't have broken any rule or regulation, would you?

A. Would I?

Q. Right?

A. I don't know.

Q. And there was no rule or regulation requiring that you see the books at that moment, was there?

A. No, sir.

Q. And you did not consider it essential that you see the books at that moment, did you?

A. Not at any particular moment, no, sir.

Q. It could be just as well deferred for a time until this question of voluntary disclosure had been disposed of. Isn't that right?

A. It could have been.

Q. Mr. Saver again didn't refuse to give you the books. He just asked you to defer the matter?

A. There was no outright refusal.

Q. When again did you take some action with respect to the books?

A. After Mr. Saver—those calls in that period of later on in September and October were all for the purpose of ob- [fol. 464] taining access to the records. I was not so concerned with the corporate records as I was with the individual records.

Q. That is right. You wanted to see what had happened to their personal wealth?

A. That is right.

Q. You wanted to see whether these corporate funds had gone into their pockets without paying taxes on it. Is that right?

A. That was the purpose.

Q. And for that purpose you needed the cooperation of the taxpayer, didn't you?

A. I wouldn't say that.

Q. Well, it would have been very helpful, wouldn't it?

A. It would have made my job much easier.

Q. Instead of spending months circularizing customers, banks and brokers, if you could get cooperation from the taxpayers, all this information about their personal wealth and their personal dealings with corporate cash could be accumulated very quickly and efficiently?

A. That always makes it much easier on the special agent.

Q. And much easier on the Government generally. It saves a great deal of the special agent's time?

A. Exactly.

Q. It saves a great deal of expense to the Government?

A. Yes, sir.

Q. So that you finally get down to November, 1948.

A. Early November.

Q. I thought you said you called on the Pattullo Modes organization along around November 19th.

A. Yes, sir. On November 4th Mr. Smith had appeared at my office, with Mr. Saver, and submitted his affidavit with respect to the voluntary disclosure on that occasion——

Q. You had some talk with Mr. Baradell on that occasion?

A. Mr. Baradell denied the voluntary disclosure.

Q. That was the occasion when you, Mr. Scherm I think you said, Smith and Saver, met in Baradell's office?

A. That is correct.

Q. And Smith said there was a voluntary disclosure and Scherm denied it, right?

A. Yes, sir.

Q. And Baradell said he didn't believe there was a voluntary disclosure in the way that the Department [fol. 465] understood voluntary disclosure?

A. Mr. Baradell just said he didn't believe there had been a voluntary disclosure.

Q. So then you went ahead again on the books, right?

A. I called Mr. Saver again.

Q. And did he answer you?

A. Yes, sir.

Q. What was the occasion of your calling him on that occasion?

A. To get the books.

Q. What time in November?

A. I believe I called him the first time in November was the afternoon of the day Mr. Baradell had rejected the voluntary disclosure.

Q. Didn't you mention it to him when he was right in the office there with Baradell?

A. No, sir, Mr. Baradell asked Mr. Saver to stay behind when I left the office because there was some other matter he wanted to talk to him about.

Q. Something not connected with the Pattullo case?

A. He didn't tell me that.

Q. You don't know what the other matter was?

A. I have no idea what it was about.

Q. Then on November 19th you went up to the Pattullo office?

A. That is right.

Q. You were asked to wait until the attorney Davis appeared?

A. I was not asked to wait. We were escorted right into a place where we could go to work.

Q. They didn't even ask you to wait until their attorney came?

A. No, sir.

Q. They gave you the books and records and said, "Go to it"?

A. No, sir; the books and records were piled up in a corner.

Q. You could have helped yourself?

A. We could have started to help ourselves.

Q. And then did Mr. Davis come?

A. Very promptly.

Q. Did he tell you that they wanted to cooperate and were willing to cooperate 100 per cent?

A. That is what he said.

Q. Did you speak to him about net worth statements?

A. Yes, sir.

Q. And did he offer you full cooperation in that respect?

A. He said they would submit net worth statements.

[fol. 466] Q. Did he offer you full cooperation in respect of the accounts and assets and cash of the individual taxpayers?

A. He said it was their intention to cooperate.

Q. He offered, didn't he? You are not quibbling with me about what he offered?

The Court: I think there is a technical distinction between offering and saying he is going to give you.

Q. He did follow it up by giving statements?

A. Net worth statements?

Q. Yes.

A. Yes, he gave me net worth statements.

* * * * * * *

Q. You mentioned a date on your direct examination of January 4, 1949. Was that a date of a conference in the office of someone in your department?

A. I believe January 4th was the date upon which the taxpayers appeared at my office and gave me statements.

Q. Handwritten statements?

A. I wrote them, sir.

Q. You wrote them and they signed them?

A. Yes, sir.

Q. And then you swore them to those statements, didn't you?

A. Prior to any writing, sir, they were interrogated under oath. The results of the interrogation were reduced to writing in my handwriting. I am not a very capable typist.

Q. Nowadays, do they use stenographers over at the office for that kind of statement?

A. Yes, sir.

Q. But in your day you had to do the writing yourself?

A. No, sir, you could have used stenographers in those days if you had wished.

Q. But you didn't want to depend on the stenographers. You wanted to get a signed confession right then and there, didn't you?

A. No, sir.

Q. You got it whether you wanted to or not?

A. I intended to get their statements.

[fol. 467] Q. Did that begin to fit your idea of cooperation?

A. It was an indication that there was a degree of cooperation.

Q. So that when they gave you a signed confession, you felt they had at least reached a degree of cooperation?

A. Yes, sir.

Q. Now, how long after that was it when this no double-cross statement was made?

A. Six days.

Q. Next day?

A. Six days.

Q. That was at a conference in Mr. Baradell's office?

A. Yes, sir.

Q. Thereafter, you had a job to do with respect to calculating the tax and the penalty and the interest, right?

A. No, sir.

Q. You had to write a report at least in which you would make calculations with respect to the tax and penalties?

A. No, sir.

Q. Was your only remaining duty to write a report?

A. Yes, sir.

Q. Were you engaged on the writing of that report for some 10 or 11 months further during 1949?

A. No, sir.

Q. Did you put off the writing of that report until you had received certain additional information?

A. Yes, sir.

* * * * * * *

Cross-examination.

By Mr. Gottesman:

Q. Mr. Clayton, were you a revenue agent before you became a special agent?

A. No, sir.

Q. You went directly into the special agent's department?

A. By transfer from another Government agency, sir.

* * * * * * *

Q. And is it normal after the special agent is assigned for the revenue agent to temporarily discontinue anything further until the special agent gets into the case?

A. Unless the special agent directs him to do something.

[fol. 468] Q. And did you direct Mr. Scherm to do anything?

A. I don't recollect that I did.

* * * * * * *

Q. And after February 1948 when was your next contact with Scherm?

A. Oh, I guess it was November 1948.

Q. When you called him to meet you to go to Pattullo Modes?

A. No. I don't know whether I called him and asked him to come down to see Mr. Baradell or whether somebody else at Mr. Baradell's direction had done so.

Q. And that was with reference to voluntary disclosure?

A. That is right.

Q. Do you know what Mr. Scherm's stand was at that time with reference to voluntary disclosure?

A. Yes, sir.

Q. What was that stand?

A. There had been no voluntary disclosure made to him.

* * * * * * *

Q. That contract called for percentages to be paid to Miss Copeland, is that correct?

A. I believe it called for a flat annual salary plus percentages accrued upon income.

Q. From about 40 to—per cent?

A. I wouldn't want to state the percentages definitely.

Q. Now, on the question of accruals, Mr. Clayton, did Mr. Scherm ever mention it to you at all?

A. What?

Q. The question of accruals which the taxpayer claimed was due to Jo Copeland? Accrued commissions?

A. Yes.

Q. The commission question was discussed?

A. Yes.

Q. And there were memoranda submitted to Scherm?

A. So I understand.

Q. What?

A. So I understand.

Q. And you discussed it between you?

A. Well, the discussion would be rather one-sided, sir. I mean——

The Court: Did you see the memorandum?

The Witness: I don't recollect having seen it, sir.

[fol. 469] Q. Did Mr. Scherm tell you that he had discussed it with anybody else in authority, other agents, the accruals?

A. He mentioned he discussed the question with people in his office.

Q. And did he tell you what conclusion they had come to?

A. Yes. He told me that the conclusion was to the effect that the facts in this case closely paralleled the facts in the basic case. I believe it was the American Snuff Company case, and he believed that the allowances would have to be made to the corporation.

Q. That report refers to a case jacket. What is meant by that term, Mr. Clayton?

A. A case jacket was merely a procedure wherein the

field agents in a short memorandum advised the chief of the Intelligence Unit that a criminal investigation was in process, stating briefly the information that we then possessed, and requested that the case be jacketed. The net effect of it is to put the Washington office on notice that an official investigation is in process.

. . . . . .

Q. Now, on page 4 of your report, Mr. Clayton, you make the statement that the revenue agent's adjustments to corporate income are based principally on undisclosed corporate income aggregating $387,572.59, for all years. Now, that is a figure which you arrived at, is that correct, by your investigation?

A. No, sir.

Q. Well, how is that figure arrived at?

A. That figure is the sum total of all of the amounts resulting from all of the means adopted by the taxpayer to withhold reported income. That was supplied to us.

The Court: By whom?

The Witness: By the taxpayers or their representative.

. . . . . .

[fol. 470] Q. What was done with those figures after you got them, Mr. Clayton?

A. As I say, they were collateral. They were not fundamental that I know of to the determination of any deficiency in income or increase in taxes. As I understand it, the individuals' income was increased by a procedure known as constructive dividends from corporate income because the sales were sales of corporate property and not of individual property, and we had to learn the income to the corporation. Then under a theory, which has been adopted and approved and which we refer to as the constructive receipt of dividends, the corresponding shares had to be reapplied to the individuals.

Q. On that basis, the tax was then computed by the revenue agent?

A. On the basis of the original specific items, not on the net worth statements.

Q. Mr. Clayton, did you ever attend a conference with reference to the Pattullo Modes case at the Ninth Avenue office?

A. Yes, sir.

Q. In whose office was that?

A. The name of the individual who was considering the case?

Q. What was it in reference to, Mr. Clayton?

A. It was with reference to the determination of the civil liability on the case. It was held in the Upper New York Division, as it was known at that time.

Q. Who was present at that conference?

A. I was at two conferences. At the first conference?

Q. Yes, sir.

A. Mr. Scherm, Mr. Fishkin was the conferee, and two attorneys, Sher and Roder. I don't recall anybody else being present. Mr. Church, who was the head of that section at that time, may have been at the conference or he may have been present when I walked into the building and first met Mr. Fishkin. I don't recollect.

Q. When was that?

A. That was in the summer of 1950.

[fol. 471] Q. Was there another conference at Ninth Avenue thereafter with reference to that?

A. Yes, sir.

Q. When was that?

A. About a month later.

Q. Who was present at that conference?

A. Mr. Sher and Mr. Roder, Mr. Fishkin, myself.

Q. Was that with reference to the civil liability?

A. Yes, sir.

The Court: Was Mr. Scherm there?

The Witness: No, sir.

Q. Were Mr. Sher and Roder disputing the amount of tax set up?

A. They were.

Q. Mr. Scherm was at the first conference but not at the second. Is that correct?

A. That is correct.

Q. He was not called in for the second conference, to your knowledge?

A. I don't know whether he was called in or not. He wasn't present.

* * * * * * *

Q. Now, at the first conference which you speak of when Scherm was present, and Sher and Roder, was any tax determination made at that time?

A. I believe the decision was deferred until the second meeting.

Q. And at the second meeting Scherm wasn't present?

A. No, sir.

Q. You and Scherm worked very closely over the period of time on this Pattullo case? I mean you saw each other frequently?

A. We did.

Q. And did Scherm do anything that you found to criticize during this period of time?

A. No, sir.

* * * * * * *

By Mr. Aranow:

Q. Doesn't a net worth statement show the assets and liabilities of a taxpayer?

A. Yes, sir.

Q. When there is no statement furnished you how do you procure a net worth statement?

A. By investigation in the field, sir.

[fol. 472] Q. What kind of investigation and how?

A. Insurance companies, brokerage houses, any person, institution or organization, what have you to which we go or could find out that the individuals have had any financial relationship with over a period of years.

Q. Do you have to circularize the entire neighborhood where the man lives?

A. That might be necessary in certain cases.

Q. And where a man lives in New York and another in Mount Vernon you have to circularize both?

A. We direct the investigation depending on our own resources and ingenuity, sir.

Q. And you have to find all of the man's assets, is that correct?

A. We try to find all of them.

Q. All of the taxpayer's liabilities?

A. We try to find all of them.

Q. Even after you get the assets and liabilities you have to find out what the expenditures were during that period by that person, is that correct?

A. Yes, sir.

Q. And how do you ascertain those facts usually?

A. In the same manner.

Q. How?

A. By circularizing among the banks, brokerage houses, finding out if they had accounts at department stores, what rental they pay, whether they had purchased houses, what taxes they had paid, contributions they might have made, medical expenses—anything——

Q. Educational?

A. Yes.

Q. Golf?

A. Yes.

Q. Or all expenses that are necessary?

A. Anything which would have caused a nickel to be deposited in their pockets.

Q. Then, for purposes of criminal prosecution you would have to have more than mere hearsay statements of those facts, wouldn't you?

A. That should be documentary evidence.

Q. Documentary evidence. Where a liability is omitted, it would have a great effect on the results accomplished, [fol. 473] would it not?

A. That would depend on the extent of the liability, sir.

Q. How do you ascertain liabilities in cases where there is no net worth statement? How do you ascertain the lia-

bilities of a taxpayer where there is no statement by him to that effect?

A. By inquiring in the fields available to us.

Q. You interview relatives and families, or just banks and institutions?

A. If we have reason to go to the members of the family we do that.

Q. It is quite a big job, isn't it?

A. It can be.

* * * * * *

Q. On January 4 I understand all of the persons were in your office and signed these confessions or statements in writing which you wrote out in longhand and had them sworn to, is that correct?

A. They signed statements on January 4.

Q. Did you see Mr. Baradell on the following day, January 5, 1949?

A. Yes, sir.

Q. And did Mr. Baradell tell you that a Mr. Saver and a Mr. Quinn had been to see Mr. Bolich in Washington some time in early November?

A. I don't know whether he told me then or in the succeeding—in the later weeks.

Q. You had a conversation with Mr. Baradell on the 5th, is that correct?

A. Yes, sir.

Q. And he questioned you about the cooperation that was afforded to you by these taxpayers and their representatives?

A. Not on that day, sir.

Q. Are you sure about that?

A. Quite sure. My recollection is that he didn't mention that until the following week.

Q. On the following week, on the 10th did you and Mr. Dowling—Mr. Dowling was your section head?

A. Group chief.

Q. Did you have a conversation with Mr. Baradell prior to the conference with the taxpayers?

A. We did.

Q. And did Mr. Baradell then ask you whether the taxpayer had fully cooperated and had disclosed fully on all [fol. 474] matters?

A. I don't recollect whether he did or not on that occasion or whether it was at the larger assembly later on in the day.

Q. At the larger assembly later on the taxpayers were represented by a lawyer by the name of Saver?

A. And Mr. Davis.

Q. And did Mr. Saver bring with him at that time a paper to the conference?

A. My recollection is he brought a slip of paper at that time.

Q. And did you see that paper?

A. After the meeting.

Q. Did you examine it?

A. I read it.

Mr. Aranow: Is that paper here? May I have that?

Mr. MacMahon: We have the paper, your Honor, but I don't see its relevancy at this point.

The Court: Well, bring out what the paper was.

Q. Did not Mr. Saver state that Mr. Bolich told him to fully cooperate and fully disclose and that if he did those things he would receive consideration for non-prosecution?

. . . . . .

The Court: What did he say on that subject?

The Witness: He stated that he, and Mr. Quinn had visited with Mr. Bolich in the early part of December, I believe, the preceding year, and that they had been advised if they cooperated they would receive a no-prosecution commitment which I think——

Q. Was the word commitment used?

A. Commitment or consideration.

Q. Now, isn't there a difference in your mind between a commitment and consideration?

A. Yes, sir.

Q. Wasn't the word consideration used?

A. I would be more inclined to say it was commitment.

• • • • • • •

[fol. 475] The Court: What words were used by Mr. Baradel?

The Witness: I don't recall that either consideration or commitment was used. I believe he just told the taxpayers in view of the promises that had been made by higher authority that there wasn't going to be any prosecution.

• • • • • • •

JOSEPH R. BARADEL, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. MacMahon:

Q. Mr. Baradel, were you at one time employed by the Bureau of Internal Revenue?

A. I was.

Q. Were you so employed in the years 1946 through 1950?

A. I was.

Q. What was your position during that period?

A. From 1946 to March 15th of 1950, I was head of the Conference and Review Section.

Q. At the special agents' office in New York?

A. Correct.

Q. Prior to September 1, 1948, immediately prior to that period, who was the head of the special agents' office?

A. Mr. Walter Murphy was acting head.

Q. Prior to September 1, 1948?

A. Oh, no, Mr. Bolich. Pardon me.

Q. And after that?

A. Mr. Walter Murphy.

Q. Do you recall a telephone conversation with Mr. Bolich with reference to the Pattullo Modes case in January of 1949?

A. I do.

Q. Would you state when that took place and what was said.

A. I believe it was in the morning of that day, January 5, 1949, at which Mr. Bolich asked whether I had the Pattullo Modes case before me for review and I told him no; I said [fol. 476] as far as I knew, it was in the hands of Mr. Clayton. I said, "I did have the case for decision on voluntary disclosure a couple of months ago and had ruled against them."

Mr. Bolich said, "Well, I had a visit from Mr. Quinn and Mr. Saver," and he said, "although your decision was technically correct, I have decided that if they give full cooperation to the agents, we ought to close that case non-prosecution."

I said, "I think it is in the hands of Clayton."

He said, "Well, convey that message to Clayton," which I did.

Q. Did you convey that to Clayton?

A. I did, the same day.

The Court: Was Mr. Bolich your superior at that time?

The Witness: Not directly so.

The Court: What position did Mr. Bolich have at the time of this telephone call?

The Witness: He was Assistant Commissioner of Internal Revenue.

The Court: As such was a superior in the Department?

The Witness: Yes, sir.

. . . . . .

Q. Following this telephone conversation with Bolich on January 5, 1949, did you have any discussion with Mr. Dowling?

A. Yes, sir.

Q. When was that?

A. January 10, 1949.

Q. Could you tell us what that was?

A. Well, Dowling and Clayton came in to see me that morning in response to my prior request to Clayton to come in and see me with Dowling when he returned. He had been away sick or something of that sort, so he couldn't talk to

me on January 5th when I talked to Clayton. On January 10th, I had set a conference date and before the conference I had a talk with Dowling and Clayton—I don't know [fol. 477] whether Scherm was there or not; I think just Dowling and Clayton—in which I repeated Mr. Bolich's instruction and said in effect that I couldn't see how we could go ahead and prosecute that case since the agents told me that the taxpayers had cooperated and Dowling then agreed with me and suggested that we close the case out with a short form report, which is known as SI-461 report.

I told him that I couldn't go along with that. I wanted a complete report because Clayton had apparently completed his investigation, and the rule was that if you substantially complete an investigation, you must write a full report.

Q. Did you tell him why you couldn't prosecute that case?

A. Well, I told him Mr. Bolich's instruction, and I took that to mean that instruction had to be followed. I knew also, of course, that once a taxpayer gets an opportunity of that sort and lives up to his end of it, it is just an impossible thing to try to prosecute.

* * * * * * *

Q. Would you explain what you meant by once a taxpayer gets an opportunity of that sort?

A. Well, of course, we couldn't last very long if we would trap the taxpayer or his attorney into giving us incriminating evidence on a promise of non-prosecution and then go ahead and use that evidence against him. The case would never go to court or the judge would throw it out, and, more than that, of course, we couldn't put the Internal Revenue Bureau in that position of having taxpayers who wouldn't depend on their word. That was the general thought back of it.

Q. Now, following this conference with Dowling and Clayton, did you have any further conference on January 10th?

A. Yes.

Q. Would you state when you had that conference and who was present and what was said?

A. Immediately following the conference with Dowling [fol. 478] and Clayton, we held a conference with I think four of the principals of Pattullo Modes and Mr. Saver, their attorney, and Mr. Davis, also their attorney, and for the Government were present Scherm, Clayton and myself.

At that conference I asked Mr. Saver to state any reasons he wanted as to why the case should not be prosecuted, and he recited just what he had put in a brief which he handed me at that time.

Q. Could you tell me what he said?

A. Yes. He said that after I had turned him down at the November conference on voluntary claim, he and his partner, Mr. Quinn, had gone to Washington and had a conference with Mr. Bolich, and that Mr. Bolich had promised them that in return for full cooperation, there would be no prosecution in the case.

Q. All right, would you continue with what happened at this conference?

A. I turned then to the two agents, Scherm and Clayton, and asked did they receive that cooperation and they said yes, they had received full cooperation.

I said, "Well, in view of that, we will close the case without prosecution but with a 50-per cent penalty."

Q. Did you say anything to the taxpayers?

A. I think I probably gave them a little lecture on honesty or dishonesty.

. . . . . .

Q. Up to January 5 and January 10th through that period, did you in your position in New York ever hear of a policy of declining prosecution in exchange for cooperation per se?

A. Not for that sole reason, no, sir.

Q. Did there come a time after January 10, 1949 when you received Agent Clayton's report?

A. Yes, sir.

Q. What did you do with it?

A. I received it in November and I read it. It occurred to me that some explanation of Mr. Bolich's decision was called for in the file. I wanted to give him the opportunity to put a statement in the file if he wanted to, so I took

[fol. 479] a carbon copy of the report and I mailed it to Mr. Bolich with a little scratch pad tag on it, "Any comments? JRB."

Q. Did you write a covering letter on that?

A. No, just a scratch pad tag.

Q. What if anything happened after you mailed that to Bolich?

A. I think about a week later Mr. Bolich telephoned me at my home on a Sunday and referred to Clayton's report and asked whether I would write an explanatory memorandum, take a little heat off the situation.

The Court: Did he use that phrase?

The Witness: I can't recall exactly whether that was his phrase or that was my conclusion, that it left him on a hot spot. I do not remember the language. However, it was my conclusion.

Q. Was that the tenor of the conversation?

A. That was the tenor of the conversation and I said, "Well, all right."

I asked him whether he had any particular ideas he wanted me to incorporate in that explanatory memorandum. He said, "No, just do the best you can with it," and I then wrote the memorandum and called Clayton in and read it to him from my pencil notes, and Clayton said it stated the facts correctly as he knew them, and then I mailed a copy of it to Mr. Bolich with another——

Q. Did you write a covering letter this time?

A. No, sir, just another scratch pad note. "Is this O.K.? JRB."

Two or three days later I got the copy back from Mr. Bolich with a scratch pad note, "O.K. DAB."

Q. What did you do with that note?

A. I threw it in the basket.

Q. Did you get any covering letter back from Bolich on it?

A. No, sir.

[fol. 480] Cross-examination.

By Mr. Aranow:

Q. You testified about the conference review section this morning. What was the purpose of that conference review section?

A. In 1946, I think it was the month of May, Mr. Bolich called me down to 253 Broadway and stated that he had a new force there that had increased fourfold within the past twelve months, and he needed somebody with my experience in conference work to try to crystallize the thought of the agents there as to what kind of a report to set up and what kind of conclusion to reach and so forth, and to be a general technical adviser to the division. I had at that time worked on the technical end, so that I think he needed that help, too. I had been an administrator for many years, and I think he needed that help, too.

Q. How many agents were there in the office at that time?

A. At the time I reached there, I think there were 220 special agents.

Q. And were there many new agents taken on in 1945?

A. Yes. A year before there were 48 special agents. When I got there, there were 218, as I recall.

Q. Was it your duty to go over the reports filed and review those reports by these agents?

A. Yes, sir.

Q. And discuss it with them?

A. Any time I had a doubt about them, yes, sir.

Q. How was this board constituted? How did you constitute a board review?

A. Originally, I was head and foot of the board and within two or three years I think we had eight conferees on the board.

Q. Did you also take the section head or division head into the conference?

A. No, sir, not unless they asked to come in or there was some real reason for it, a special reason.

* * * * *

Q. Did Mr. Bolich discuss with you his desire to wherever possible collect the money rather than engage in litiga-

[fol. 481] tion?

A. I think at one time he told me that the trend seemed to be to get the cash——

Mr. MacMahon: Your Honor, may we have the time fixed?

Mr. Aranow: Yes.

Q. Can you fix the time, Mr. Baradel, approximately?

A. Well, it was, I believe,——

Mr. Aranow: Will the gentleman please sit down while I am examining?

Mr. MacMahon: I am sorry. I didn't mean to get in your way.

A. (Continuing) I believe it was after he became Assistant Commissioner.

Q. When did you first hear of the Pattullo case, Mr. Baradel?

A. In May of 1948.

Q. Who brought that case to your attention? Do you remember?

A. I first learned about it by a letter from Mr. Schwaeber asking for a conference on the case.

Q. Who was Mr. Schwaeber?

A. A partner of Mr. Saver, tax attorneys.

Q. Do you know Mr. Schwaeber?

A. I know Mr. Schwaeber.

Q. How long have you known him?

A. I would say from the time I went down there in 1946.

Q. Do you know Mr. Saver?

A. Yes, sir.

Q. How long have you known Mr. Saver?

A. I knew of him I think probably about that same time because he was Assistant United States Attorney in Brooklyn and did handle tax fraud matters for the Government at that time. Later in 1948 I think he entered the partnership with Mr. Schwaeber and then was presenting cases in our office for the taxpayer.

Q. Did you also know that he was an Assistant Attorney General of the United States?

A. I think I did hear that.

[fol. 482] Q. If you don't know of your own knowledge——

A. I don't know of my own knowledge.

Q. You said in May you were asked for a conference. Is that correct?

A. Yes, sir.

Q. When did you have the conference?

A. That conference that he had asked for was finally held on January 10, 1949.

Q. As late as that?

A. That was the conference that he asked for. In the interim I had two or three conferences with Mr. Saver, which were not in response to this original letter, but they were to present the voluntary disclosure claim.

Q. Did there come a time when he came to your office on this question of the voluntary disclosure?

A. Mr. Saver did with Mr. Quinn.

Q. Who is Mr. Quinn?

A. He became a member of that same firm subsequent to the time Mr. Saver went in.

Q. Who is he, do you know?

A. Yes, I know him. He is a former Assistant United States Attorney in Brooklyn and is now, as I understand it, the District Attorney of Queens County here.

Q. A man of reputation in the community?

The Court: Was he a Congressman?

The Witness: He was a Congressman.

The Court: Was he a Congressman at the time he came to see you? I have heard reference to him being in Congress.

Mr. Aranow: He was elected in Congress late in 1948.

The Witness: He didn't enter Congress until sometime in 1949.

Mr. Aranow: March of 1949.

The Court: There was some talk about his being a Congressman and I just wanted——

Mr. MacMahon: So that the record will be straight on that, he was elected to Congress in November, 1948.

[fol. 483] Mr. Aranow: He was not sworn in until March of 1949.

The Court: Now I think we have the date.

Q. Do you remember the date of that conference when Mr. Saver dropped in to see you?

A. Yes, sir. Saver and Mr. Quinn I think came in on October 15, 1948.

Q. Do you remember the subject of the conference?

A. They presented the claim that there had been a timely voluntary disclosure.

Q. Did Mr. Saver bring you any proof of that?

A. He made a verbal statement at that time, and I asked him to put it in writing. A few days later I called him on the phone and said I wanted also an affidavit from Mr. Smith, who had claimed he had made this voluntary disclosure to Mr. Scherm.

Q. That statement in writing, was that in the nature of a memorandum by Mr. Saver,

A. That is what I had requested.

Q. And was that put in the file?

A. Yes. That was submitted at the January 10th conference. Prior to that time, Mr. Smith's affidavit was submitted to me without a memorandum from Mr. Saver.

Q. Did you ever send for Mr. Saver and Mr. Smith?

A. Yes, sir; shortly after the visit from Mr. Quinn and Mr. Saver and immediately after receiving Mr. Smith's affidavit, I phoned Mr. Saver and asked him to bring Mr. Smith in so that I could have a face-to-face meeting with him and question him on this point.

Q. Did he bring Mr. Smith in?

A. Yes, sir.

Q. Did you bring anybody in?

A. Not at that conference.

Q. Did you have a conference with Mr. Smith and interrogate him about the affidavit?

A. Yes, sir.

Q. Did you tell him anything about that affidavit?

A. What I told him at the time was that if the statements which he made were true, we will close the case as a [fol. 484] voluntary disclosure, but that I wanted to check his statements with Mr. Scherm, with whom he claimed to have had these negotiations, and it was my intention to call Mr. Scherm in and if Mr. Scherm admitted the truth

of the Smith affidavit, I would close the case out, but otherwise I would have a joint hearing at which Mr. Smith, Mr. Saver and Mr. Scherm, Mr. Clayton and I would sit down and thresh it out.

Q. Did you see Mr. Scherm after this conference with Saver and Smith?

A. Yes, sir.

Q. Did you have a talk with him?

A. Yes, sir.

Q. Did you tell him what Smith and Saver had said?

A. Yes, sir.

Q. What did Scherm tell you?

A. He denied it.

Q. Did you ask him to bring any proof of facts at that time or documents?

A. I had called his chief, Mr. Wheeler, on the phone and told him to send Scherm down with the official record of the assignment of the case and the date that this 917 had been received, signed and so forth. When Scherm came down, and I believe it was the first time I met the man, he had these records with him. Saver and Smith waited in the outer room while I had a preliminary conference with Scherm and Clayton. I went over the data with him, then called Saver and Smith into the conference, and the five of us discussed the matter.

Q. Did you question Mr. Smith in the presence of Mr. Scherm?

A. Yes, sir.

Q. And did you question Mr. Scherm in the presence of Mr. Smith?

A. Yes, sir.

Q. What did Mr. Scherm tell you?

A. Mr. Scherm denied Mr. Smith's statements.

Q. Did you make any statement about Mr. Smith's statements?

A. Yes, sir.

Q. What was your statement?

A. I told him at the conclusion of this conference that either he had the worst memory I had ever come across in my long experience or that he was lying.

[fol. 485] Q. Now, coming down to January 5, 1949: Do you remember that date?

A. Yes, sir.

Q. Do you remember whether Mr. Bolich called you or you called him at that time?

A. My best recollection is that he called me.

Q. And do you remember him stating to you, or, rather, tell me what he said to you at that time?

A. He asked whether I had the Pattullo Modes case before me and I said I did not, but that I had a couple of months previously ruled against the voluntary disclosure claim. I said, "I think Clayton has the case for investigation now."

And he said, "Well, will you convey this message to him? I made an arrangement with Mr. Saver and Mr. Quinn that in return for their full cooperation the case would be closed without prosecution."

Q. Is that the full statement?

A. That is approximately the complete statement—oh, wait a minute, excuse me. I also stated to him, "Well, you are taking full responsibility for this?" And he said, "Yes, I am, and let the record show it."

Q. Didn't he ask you to put it on the blotter so that the record did show it?

A. No. I think he said it just about the way I just repeated.

Q. Let the record show it?

A. Let the record show it.

Q. Didn't he tell you that he had advised the taxpayers that there was no merit to their claim for voluntary disclosure on that telephone?

A. He told me that he had said that my decision was technically correct, he thought.

* * *

Q. But he told you to put it on the record, didn't he?

A. He said yes, he took full responsibility and let the record show it.

Q. He didn't ask you to hide it?

A. No.

* * * * *

Q. When you told Mr. Clayton what Mr. Bolich had telephoned you what did Mr. Clayton say?

[fol. 486] A. He agreed with my reaction to the effect that the prosecution's recommendation would not be appropriate.

Q. Did he say anything else?

A. Yes. He said the taxpayers were very high class people, charitable people, and also that would be taken into consideration in the event that the case should go to prosecution, and that he thought the judge would give him an SS because of his charitable standing in the community.

Q. Did he say anything about the cooperation he received?

A. He said they had cooperated.

Q. Is that all he said?

A. I think that is about—they gave full cooperation.

Q. Did he say he had very complete cooperation?

A. Yes.

* * * * * * *

Q. Did you subsequently have a conference with Mr. Clayton and Mr. Dowling?

A. Yes, sir.

Q. Do you remember the date of that?

A. That was January 10, 1949.

Q. And what happened at that conference?

A. I again recited the substance of Mr. Bolich's telephone call of January 5 to Mr. Dowling and told him my reactions, to the effect that it was no longer good for prosecution, and Dowling concurred in that opinion and then suggested that we close the case out with a short report known as a 461 close-out. I told him that would be inappropriate because under the SI-461, you did that only when you had made a partial examination and not a complete examination.

* * * * * * *

Q. Later that day did you have a conference with the taxpayers?

A. Yes, sir.

Q. Did Mr. Saver make a statement at that time?

A. Yes, sir.

Q. Will you please tell us the substance of the statement that Mr. Saver made at that date?

A. Yes, sir. He stated that following the conference held in my office in November, I think it was the 3rd or [fol. 487] the 4th, that he and Mr. Quinn had gone to see Mr. Bolich in Washington, and that as a result of that conference Mr. Bolich had advised them that the case would be closed without prosecution if they in turn gave complete and full cooperation to the Government agent.

* * * * * * *

Q. During your experience in that office, had there been status reports made by agents to the chief in charge?

A. Yes, sir.

Q. Isn't that a rather common practice?

A. I think it was fairly common.

Q. When a taxpayer comes in to see the chief and he wants to know anything about a case, isn't that the usual procedure, to get a status report?

A. Either in writing or verbally.

* * * * * * *

Q. Mr. Baradel, do you recall in the end of 1949 you had a conversation with Mr. Bolich about some memorandum? Do you remember that?

A. Yes, sir.

Q. And you asked him whether he had any suggestions what to put in that memorandum?

A. Yes, sir.

Q. And he said he had no suggestions?

A. That is correct.

Q. Isn't it a fact he told you to get the facts and state the facts, all of the facts, so that the case may be judged fairly?

A. He said, "You know the facts of the case. Do the best you can with the memorandum."

Q. And you made a memorandum?

A. Yes, sir.

Q. And you filed that memorandum?

A. Yes, sir.

* * * * * * *

By Mr. Bennett:

Q. Saver and Smith together came in to see you in October, didn't they?

A. Yes, sir.

Q. That is the time you had your preliminary talks about the question of voluntary disclosure?

A. Yes, sir.

[fol. 488] Q. And then, as I understand you, that was followed up by the filing of an affidavit?

A. Yes, sir.

Q. And that affidavit, which was filed at that time, was the affidavit, of the accountant, Smith, which related his position with respect to voluntary disclosure. Isn't that right?

A. Yes, sir.

Q. Was it at the time that that affidavit was received, or was it at a later date that you called Scherm in to confront Smith?

A. It was about two weeks later.

Q. And there you had the two of them before you, Smith saying he had made a disclosure and Scherm saying he hadn't. Is that right?

A. In substance, yes.

Q. And you, of course, as you have testified, sided with Scherm on that and turned down the claim of voluntary disclosure?

A. That is correct.

Q. Then, as you understood it a little later, Mr. Saver and Mr. Quinn went down to Washington and saw Mr. Bolich about this claim of theirs?

A. Yes, sir.

The Court: You learned that from Mr. Bolich, not from any personal knowledge. Is that right?

The Witness: No, I learned that from Mr. Bolich on January 5, 1949.

Q. You also learned it, did you not, from Mr. Saver when he came in on the 10th?

A. Yes, subsequently, that is correct.

* * * * * * *

Q. At that time did Clayton tell you that they did have a good prosecution case or that they didn't?

A. I don't know that he expressed himself one way or the other, but I had the impression that he thought he was thinking of recommending prosecution in the case.

Q. Now, let me read you this and see if it refreshes your recollection: "Clayton indicated that he did not believe that we had a very good prosecution case"——

Mr. MacMahon: Your Honor, I submit that is not a complete statement of that sentence.

[fol. 489] The Court: Is that the whole sentence there?

Mr. Bennett: No. I am going to read the rest of it: I didn't want to take the whole——

Mr. MacMahon: I submit that is out of context and misleading.

The Court: You had better read the whole thing if you are going to ask the witness about it.

"January 5. Discussed matter with DAB over long-distance phone and at his suggestion later discussed it with Clayton. Told Clayton that DAB had advised full cooperation and that in the event of prosecution this office would be in a most embarrasing position by having to depend on the evidence furnished upon such advice, which would, of course, raise the cry of 'double cross.' Clayton indicated that he did not believe that we had a very good prosecution case because of such factor and the very complete cooperation furnished the examining officers, and in addition pointed out the very high caliber of the taxpayers involved in this case, etc., in support of the opinion that at the most the Government could expect to get a S. S., in the event of conviction. I told him that I did not want to dictate the decision to him and he is at liberty to write the case up either for or against prosecution, but suggested that upon Squad Leader Dowling's return to the office, the three of them sit down and further discuss what recommendation is proper." Now does the reading of that entry refresh your recollection that Mr. Clayton said that he didn't think they had a very good case for prosecution?

A. Well, Clayton straddled the issue with me at that date I think he was—he wanted time to think it over. That

was my impression. He kind of went along with my idea that you couldn't prosecute under those conditions, and yet the thing wasn't closed until Dowling came in and we had the three-way conversation about it.

Q. Your idea was that where a taxpayer in good faith had offered full cooperation and had been promised [fol. 490] consideration for that, that it would be very embarrassing for your office to try to turn around and upset it?

A. After cooperation was given under the arrangement.

Q. Exactly.

A. Yes, sir.

Q. You thought the taxpayer might very rightfully cry to heaven that he had been double-crossed?

A. Yes.

Q. Did Mr. Clayton agree with that?

A. I think he straddled the whole thing. He wanted to think the whole thing over, I believe. That was my impression, and that is why I told him at the time, "Clayton, you write it up any way you see it, for or against prosecution," but I made it very plain to him that I would write a recommendation to the agent in charge that he be reversed if he did recommend prosecution under those conditions.

Q. Doesn't that refresh your recollection that at that time you still regarded it as open to you and to Clayton to decide and pass upon this recommendation, as to whether they would be for prosecution or non-prosecution?

A. Well, my mind was clear. I wasn't sure that Clayton's was, and I wanted to give him a chance to talk with Squad Leader Dowling. Mine was made up definitely.

Q. If you didn't want to recommend prosecution under the circumstances—

A. I would have written a dissenting memorandum if he had written prosecution in his report, and dumped the whole thing on the desk of the agent in charge for final decision.

Q. And doesn't that also refresh your recollection that Clayton was free to write any kind of report he wanted to?

A. Oh, yes.

Q. And you were free to write any kind of report you wanted to?

A. That is correct.

Q. And that the special agent in charge was free to write any kind of report he wanted to?

A. He would decide it between Clayton and me if we differentiated.

Q. You, Clayton and the special agent still had the matter to decide, did you not?

A. No. My decision was solid, and I think Clayton——

[fol. 491] Q. You may have made up your mind—

A. My mind was made up definitely.

Q. What I am saying is that you still had the right of decision.

A. If Clayton had persisted in recommending prosecution, I would have then been obliged to write a dissenting memorandum, but Mr. Clayton finally—I think he was half convinced at that time, but was fully convinced when he, Dowling and I sat down, that it was a case that you couldn't ask for prosecution.

Q. And you would write such—

A. Oh, yes, I would.

Q. —memorandum?

A. I would have.

Q. Because it was part of your function to pass upon these questions, was it?

A. Yes, sir.

Q. And it was your duty to write it as you saw it?

A. Yes.

Q. And it was the special agent in charge's duty to review your action?

A. Yes, sir.

Q. And you could have, if you wanted to, however, written a memorandum recommending prosecution?

A. Yes, sir. If I believed that was proper I would have done that regardless of whether Clayton recommended prosecution or not. If he recommended no prosecution and I thought there should be prosecution, I would have written a memorandum against him, and asked the agent in charge to decide. If it went either way.

Q. Then, again, we agree that at the end of January 5, 1948, you had the right and the power and the duty to decide whether there should be prosecution or not?

A. I had the right, power and duty to make a recommendation to the agent in charge.

Q. Yes.

A. I couldn't decide it. I had to make a recommendation only.

Q. And you in reaching the conclusion which you did reach on it were governed by all of the factors that had been brought to your attention up to that date?

A. Yes, sir.

Q. And you exercised your honest discretion in reaching your conclusion?

A. That is right.

[fol. 492] Q. Now, then, you had a conference on January 10, 1949?

A. Yes, sir.

Q. With the taxpayers?

A. Yes, sir.

Q. Now, I would like to be specific about this: Who among the taxpayers were present?

A. Mr. Zipser, Mrs. Segel, Mr. Marks and Mr. Cohen.

Q. And in addition they had their lawyers, Saver and Davis, correct?

A. Yes, sir.

Q. And on your side there were yourself, Revenue Agent Scherm and Special Agent Clayton, correct?

A. Correct.

Q. Now, at that time were all present in the one room?

A. Yes, sir.

Q. Throughout the conference?

A. Yes, sir.

Q. And I suppose everybody was paying quite careful attention to what you were saying?

A. I presume so. I didn't see anybody sleeping there.

Q. They were very much interested?

A. I presume so.

Q. Now, did you say to Mr. Saver in the conference right there in the presence of all the people whom you have mentioned that in your opinion the affidavit previously submitted by the accountant Smith was false in view of the fact that Revenue Agent Scherm had submitted his report after the date of the alleged disclosure by Smith,

and that such report made no mention of the fact that the figures therein were incorrect?

A. Yes, sir.

Q. When you referred to that affidavit of Smith did you refer to the question of voluntary disclosure or claimed voluntary disclosure?

A. I believe that was the subject matter of the affidavit, and actually, I would have referred to the fact that I considered it not a good voluntary disclosure.

Q. You said Mr. Saver had already reported to you as part of the conference with Mr. Bolich that Mr. Bolich had been inclined to agree with you on the subject of voluntary disclosure?

A. Now Mr. Bolich told me that. I don't know that Mr. Saver repeated it. Maybe he did.

[fol. 493] Q. Now, let me show you Exhibit T for identification and I will ask you to look at it and see if you can refresh your recollection. Give us your best recollection on the subject.

A. Could you repeat that question?

(Last two questions repeated.)

Q. Does this refresh your recollection, this reading of Exhibit T for identification that the subject of voluntary disclosure was referred to in that conference between you and Saver?

A. I believe it was, sir.

Q. And you know that the affidavit of Smith was referred to, don't you?

A. Yes, sir.

Q. And that you said the affidavit of Smith was false?

A. In my judgment, yes, sir.

Q. In your judgment?

A. Yes.

Q. Now, did Mr. Marks have anything to say at that point?

A. None of the taxpayers spoke at all at the conference.

Q. And that includes, then, Mrs. Segel? Neither Mr. Marks nor Mrs. Segel had anything to say?

A. None of them.

Q. They didn't ask what you were talking about or anything at all?

A. No, sir.

Q. Would you glance through your entry of January 10, 1949.

A. You mean the entry on the conference of January 10th? There are three entries here.

The Court: What is the question?

Q. See if it doesn't refresh your recollection that when Mr. Saver was reporting what Mr. Bolich said, he told you that Mr. Bolich said they would receive no-prosecution consideration.

The Court: That is what Mr. Saver said?

The Witness: Yes, Mr. Saver said.

The Court: That is what the witness has said.

[fol. 494] Q. So when the time came in November of 1950 when you were writing the memorandum, that wasn't the first time you used the expression no-prosecution consideration, was it?

Mr. MacMahon: Your Honor, I submit that that is the wrong date in the question. I don't think it is intentional, but it is the wrong date.

The Witness: 1949, not 1950. I repeated that phraseology which I took from Mr. Saver's brief to be on the safe side.

Q. Well, you had used his very language in quotation marks in your entry of January 10th.

A. Yes, sir, that is the proof of the pudding right there.

Q. As a matter of fact you and Mr. Clayton considered the case from all angles on January 5th, didn't you?

A. I don't know what Clayton did, but my mind was made up before I even talked to Clayton.

Q. You considered the case then before you talked to Clayton?

A. Yes, sir. As soon as I got the phone call from Mr. Bolich I came to a conclusion.

Q. You came to a conclusion on the question of cooperation and the effect of it, right?

A. Yes, sir.

Q. Now, isn't it your experience that many cases are

recommended for prosecution which never get to prosecution?

Mr. MacMahon: Your Honor, I object to the question as immaterial.

The Court: I will allow it. You may answer.

A. Yes, sir.

* * * * * * *

Q. Isn't it a fact, Mr. Baradel, that many cases where you have substantial cases for prosecution are in fact compromised with the taxpayer without criminal prosecution?

A. That word compromise puzzles me because there [fol. 495] are all kinds of compromises. If you mean we occasionally——

Q. Settle without criminal prosecution?

A. Settle without criminal prosecution, settle civilly without prosecuting, yes, sir.

* * * * * * *

Q. Are you actively engaged at the moment in any business?

A. Yes, sir.

Q. Having to do with taxes?

A. I am a tax consultant. I have an office on my own.

Q. You have a Treasury card?

A. Yes, sir.

Q. Entitling you to practice before the Treasury?

A. Yes, sir.

Q. Are you a lawyer?

A. No, sir.

* * * * * * *

Re-direct examination.

By Mr. MacMahon:

Q. Mr. Baradel, following your talk with Mr. Bolich on January 5, did you at that time come to the conclusion as to whether you could prosecute this case or not?

A. Yes, sir.

Q. And what was your conclusion then?

A. That prosecution was not feasible.

Q. Why wasn't it feasible?

A. Because Mr. Bolich had made this arrangement, and I talked with Clayton and found that they had submitted evidence in accordance with that arrangement with Mr. Bolich.

Q. Now, was it Bolich's decision or your decision not to prosecute?

A. Well, I took it that it was Mr. Bolich's decision. That was my understanding.

Q. Now, on the merits of this case apart from Mr. Bolich's arrangement, was this case one for prosecution or wasn't it?

A. I think it was a good prosecution case.

Mr. MacMahon: That is all.

[fol. 496] Re-cross examination.

By Mr. Bennett:

Q. Well, whether it was a good prosecution case or not, there are many other factors which enter into every case, before a final conclusion could be reached on prosecution?

A. Yes, there are many defenses offered in practically every case.

Q. The question of expense, whether it would be better for the Government to get the money? That is a prime consideration?

A. No, it isn't a prime consideration. It is secondary.

Q. It is one of the considerations?

A. It is not too important.

Q. Answer my question. Is it one of the considerations?

A. Yes. You said prime. I said not prime.

Q. Did I understand you correctly, did you tell me on cross examination that you reached the conclusion in your own mind as to whether this case should be prosecuted after you had spoken to Mr. Bolich?

A. Yes, sir.

Q. And you reached that conclusion upon the taking into consideration the nature of the case, the report of Mr. Clayton, what he discovered, and what you found at that time he discovered and possible defenses?

A. Yes.

Q. And you had reached such a conclusion honestly as a matter of your own decision?

A. Anything I did, I did honestly.

Q. Then, was it your honest decision that this case should not be prosecuted?

A. After talking with Mr. Bolich, yes.

Q. Naturally, you had to take into consideration the fact that they had been promised that he would receive consideration on the question of no prosecution?

Mr. MacMahon: I submit that is misquoting the testimony. It is done deliberately to get the word consideration——

The Court: Rephrase the question, Mr. Bennett. I think it is improper in form.

[fol. 497] Q. Didn't you consider that the taxpayer had been promised that he would receive no prosecution consideration for full cooperation?

Mr. MacMahon: Your Honor, I still object to the form of the question.

The Court: I will allow that.

A. If you will eliminate the word consideration——

Q. No, I won't eliminate it.

A. Then I can't go along with that expression because at that time I had not heard that expression. That expression I heard for the first time in Mr. Saver's talk on January 10th, which was five days later.

Q. When you came to reach this honest conclusion that you were talking about which was on or about January 5th.

A. Yes, sir.

Q. 1949?

A. Yes, sir.

Q. You knew that you had a decision to reach on a matter before you?

(Last question read.)

The Court: Rephrase the question.

Q. Did you have a job to do, Mr. Baradel, in that department with respect to the Pattullo Modes case?

A. Yes, sir.

The Court: The witness has testified to all of that.

Q. And did you have a decision to make on or about January 5, 1949?

A. Yes, sir.

Q. Did you make that decision honestly in accordance with your best judgment?

A. Yes, sir.

* * * * * * *

[fol. 498] JAMES W. DOWLING for Government.

* * * * * * *

Direct examination.

By Mr. Ferguson:

Q. During the course of your duties as a group chief at 253 Broadway, did you have occasion to hear of the Pattullo Modes case?

A. Yes, I did.

Q. Would you tell us the occasion on which you first heard of Pattullo Modes?

A. It is my recollection that some time during February 1948, Revenue Agent Harry Scherm came to my office with a letter of transmittal, indicating that the case had been referred by his office to the Intelligence Unit for a joint investigation.

Q. Mr. Dowling, I show you Government's Exhibit 50 in evidence and ask you if that refreshes your recollection as to the date when Mr. Scherm came into the office (handing).

A. Yes, it does. This is a transmittal letter and assignment slip, which bears my initials in the lower righthand corner.

Q. What is the date?

A. February 13, 1948 is the date of the assignment.

Q. To whom did you assign the case, Mr. Dowling?

A. I assigned the case to Special Agent Vincent Clayton.

Q. When did you next hear of the Pattullo Modes case in your official duties?

A. The next, I think it was about the latter part of July of that same year, 1948; I received a telephone call one morning from Special Agent in Charge Bolich.

Q. Did you recognize the voice?

A. Yes, I did.

Q. Continue.

A. Well, Mr. Bolich asked what Special Agent Clayton was doing on the Pattullo Modes case, and I told him that I did not know, at that moment that Special Agent Clayton was then out of the office, and I had not had contact on the case with him recently, I think not since the assignment. He said, "Tell Special Agent Clayton to stay away from the banks and not visit any third parties in connection with his investigation," that Pattullo Modes was a large concern and that contacting third parties and particularly banks [fol. 499] might jeopardize the credit of the concern.

Q. Is that all there was to the conversation?

A. I believe that is just about it.

Q. Thereafter, did you inform Special Agent Clayton as to the instructions?

A. Yes, I did. My recollection is that I left a note on his desk and asked him to see me when he came in, and I am quite certain that he came in that same afternoon, some time during the course of the afternoon, and I conveyed Mr. Bolich's instructions to him just about in the same language that Mr. Bolich had given them to me. Clayton stated, "That's strange. I was just out to Loehmann's this morning." I understand it is a department store in Brooklyn.

He stated, "I was just out to Loehmann's this morning making arrangements to pick up some canceled checks."

Q. Thereafter, what was your next contact with regard to Pattullo Modes with anyone in the Internal Revenue?

A. I think it was just a few days later, about a week later, Mr. Bolich telephoned me again and asked for a status report from Clayton on the case.

Q. Did you instruct Mr. Clayton to prepare the status report?

A. Yes, I did. I think I instructed him right about that same time. I think he was in the office.

Q. I show you Government's Exhibit 51 in evidence and

ask you if that is the status report prepared (handing).

A. Yes, sir, this bears my initials. This is the original status report. It bears date of August 6, 1948.

Q. And your initials are——

A. In the lower righthand corner.

Q. What did you do with the status report?

A. I forwarded it up to Mr. Bolich's office.

Q. Thereafter, what was your next contact in regard to Pattullo Modes with anyone in Internal Revenue?

A. Well, I was in the hospital for about two weeks during the latter part of December, and I returned to duty I [fol. 500] believe on or about January 10, 1949, and the very morning that I walked into my office, Special Agent Clayton was looking for me and he advised me then that Mr. Baradel wanted to confer with him and me regarding the Pattullo Modes case.

Q. Thereafter, did you confer with Mr. Baradel and Mr. Clayton?

A. Yes, Special Agent Clayton and I went immediately to Mr. Baradel's office on the next floor above, on the 10th floor, and had a brief conference with Mr. Baradel.

Q. What was the subject matter of the conference?

A. Mr. Baradel stated that he had received a telephone call from Mr. Bolich within the past few days, and that Mr. Bolich had advised him that he had promised the attorneys for Pattullo Modes that there would be no prosecution in return for their full cooperation. Mr. Baradel stated that he was not particularly in accord with it, but nevertheless those were the instructions, and he went further on to say that he thought that the case was effectively killed for prosecution purposes; that if it were tried, if the taxpayers were prosecuted, Mr. Bolich no doubt would have to be called as a witness and would have to testify that he had made this promise, and that therefore he did not think the Government would obtain a conviction. With that I agreed.

I told Mr. Baradel that I didn't approve of the manner in which the case had been disposed of, but I agreed with him that if those were the facts, the case was effectively ruined for prosecution purposes, and I recommended that the case be referred immediately back to the revenue agent's office under SI Form 461.

Q. What was that?

A. That was a mimeograph published by the Special Intelligence instructing the Intelligence Unit as a whole, the personnel, that once it was ascertained that there was no possibility of prosecution in the case, that generally the Intelligence Unit should withdraw from the case, refer it to the internal revenue agent in charge for further examination for the audit.

[fol. 501] Q. What was the decision as to your suggestion as to SI 461?

A. Mr. Baradel stated no, that he did not want the case referred back to the internal revenue agent in charge for fear that the revenue agent's office would, as he put it, wash out the tax and penalty. He said he would insist that we remain in the case.

Q. Was any other reason given for the referral or the refusal to withdraw on the part of the Intelligence Unit?

A. My recollection is that is the only reason he gave at that time.

Q. Mr. Dowling, prior to the 10th of January, 1949, did you have any knowledge of any promises made in the Pattullo case by anyone in the Internal Revenue?

A. No, I did not.

Q. Other than the occasions on which you have testified you had conversations with Mr. Bolich, did you have any other conversations with Mr. Bolich prior to January 10th with regard to Pattullo Modes?

A. Not to my recollection.

Mr. Ferguson: Your witness.

Cross examination.

By Mr. Aranow:

Q. Mr. Dowling, with reference to your statement to Mr. Clayton that Mr. Bolich had told you not to contact third parties, is there anything else added to it?

A. Did I add anything further?

Q. Yes.

A. I don't remember the exact conversation now. I think Mr. Clayton and I had further discussions, yes.

Q. Didn't you tell Mr. Clayton at the time not to contact

third persons because there was a very prominent lawyer in the case and that the lawyer promised cooperation in the matter?

A. No, I don't recall that I told him that.

Q. While they are looking up the testimony, when did you resign from the Internal Revenue Department?

A. It was on or about June 22, 1951.

[fol. 502] Q. When were you employed by the King Committee?

A. That was the following Monday. I resigned on a Friday. It was the following Monday. I suppose it was on or about the 25th.

Q. And you have been and were the chief investigator for the King Committee and the Kean Committee for several years. Isn't that so?

A. No, sir. I was chief investigator for the Congressional Committee for about ten months.

Q. Did you have a diary at that time in your office?

A. A diary while I was with the Internal Revenue?

Q. Yes.

A. I had a diary but I very rarely made entries in it.

Q. Did you make any written memorandum of your statement to Mr. Clayton?

A. No, sir, I did not.

Q. Or your conference with Mr. Bolich?

A. No, sir.

Q. Did you make any diary entry of your conferences with Mr. Baradel?

A. No, sir.

Q. Did you make any written entries at all relating to it?

A. No, sir.

Q. You are testifying to this from your memory?

A. That is right.

Q. And that happened what date?

A. What is that?

Q. The date with Mr. Baradel.

A. On or about January 10, 1949.

Q. What have you done to refresh your memory as to that date?

A. Well, I discussed the matter with Special Agent Clayton prior to going before the grand jury, and I do recall

that it coincided with my return to duty after being in the hospital, and I know that was just about the 10th of January.

Q. And you remember the conversation you had with Mr. Baradel?

A. I remember the substance of it, yes.

Q. Do you remember what you said to the King Committee when you sought employment there?

A. What I said to them?

Q. Yes.

[fol. 503] The Court: About what?

Mr. Ferguson: This is completely immaterial.

Mr. Aranow: I am trying to test his memory.

The Court: That is a strange way to test a man's memory. If it has anything to do with this case, you may ask if.

Mr. Aranow: I will withdraw the question.

Q. See if this will refresh your recollection. I am reading from page 2781.

A. Of what?

Q. You stated that you made——

The Court: The witness wants to know are you reading the testimony of some witness?

Mr. Aranow: I am reading the testimony of Mr. Clayton on direct.

The Court: All right. Read that and ask him if that refreshes his recollection.

Q. "Q. Did you receive any other information at or about the time of this status report from anyone in your office with respect to this investigation?

A. Yes, sir, the next communication I had was also from Mr. Dowling. He came in and verbally advised me that he had been told by Mr. Bolich that I was not to communicate with third parties, that the taxpayers were going to cooperate with the Government and make available the information revolving around the attempted evasion of income taxes." Does that refresh your recollection?

A. That could be the conversation, yes, sir. I don't remember the exact—I couldn't quote verbatim what we said.

Q. This does refresh your memory?
A. Yes, I think it does.

* * * * * *

[fol. 504] REGINALD D. WATKINS, called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Ferguson:

Q. Mr. Watkins, where do you reside?
A. Washington, D. C.
Q. What is your occupation?
A. Vice-president and treasurer of Munsey Trust Company.

(Government's Exhibit 58 marked for identification.)

Q. Mr. Watkins, I show you Government's Exhibit 58 for identification and ask if you can identify those three documents (handing).
A. Yes, sir.
Q. What are they?
A. They are the entrance cards to our safe deposit vault.
Q. For whom?
A. For Henry Grunewald.
Q. Does it indicate the dates on which the entry was had?
A. It does.

* * * * * *

Q. The first card has a date stamp 1948, October 29, 3.14; 1948, October 29, 3.23. Can you indicate to us what the significance of those date stamps is?
A. That is the year and the day of the month and the time of the day that the box was entered and replaced.
Q. And the date stamps on the other two cards, January 13th and January 14th, similarly indicate the year and the time?

A. That is correct.

The Court: January 13th and 14th of what year?

Mr. Ferguson: 1949.

May I read these to the jury, your Honor?

The Court: Yes.

(Mr. Ferguson read Government's Exhibit 58 to the jury.)

The Court: That last card, what time did it say entered or surrendered?

[fol. 505] Mr. Ferguson: January 14, 1949, 3.08; January 14, 1949, 3.07.

Mr. Singer: He must have gone in backwards, your Honor.

The Court: Which is which?

Q. Can you tell us is there an upside down stamp on that?

Mr. Aranow: I guess he went in upside down.

A. The reason for that is that the custodian in placing it in the time clock used the wrong end at the time of entrance, so then she reversed it when the box was replaced.

Q. So the entrance is at 3.07 and he left at 3.08?

A. That is correct.

. . . . . .

Cross examination.

By Mr. Corbin:

Q. Mr. Watkins, are you an officer of the safe deposit company?

A. It is a trust company. We operate a safe deposit department.

Q. So that it is all under the same jurisdiction, namely, the corporate entity, the trust company?

A. That is correct.

Q. Of which you are I think you said a vice-president?

A. Yes, sir.

Q. Do you know Mr. Henry Grunewald?

A. I know Mr. Grunewald as a customer of the bank, yes, sir.

Q. For how many years?

A. Oh, possibly 30.

Q. Did he have an account with you during that entire period?

A. I may be off five or six years or so, but it has been a considerable period of time.

Q. Is he still a client and customer of the bank?

A. Mr. Grunewald has no business with us at this time.

Q. Were you asked by the Government to bring or did you bring any other records of visits of Mr. Grunewald to this safe deposit box or either of these safe deposit boxes?

A. Yes, sir.

[fol. 506] Q. Do you by any chance have with you here today records of other visits?

A. I don't have them with me personally. They are in the court.

Q. I don't see them. Where do you suspect they are?

A. I imagine the district attorney has them in his possession, sir.

Q. That is, you brought them up this morning or last night?

A. Yes, sir.

Q. And delivered them to the district attorney or one of his assistants?

A. That is correct.

* * * * * *

The Court: What are they generally? What categories are they in?

A. I have numerous entrance tickets similar to those that were exhibited to the court. I have several signature cards pertaining to various safe deposit boxes together with our date record of entrances to these various boxes.

Q. Now, over what period of time do these cards or records cover?

A. From 1947 through 1952.

Q. There are cards there that reflect the visits to the vault? I don't mean single visits like the cards constituting this Exhibit 58, but cards that summarized visits over a period?

A. Well, I might answer that in this way. Each time that

an entrance card is signed and entrance is had to the box, the date is stamped on a supplementary record.

Q. That is what I was wondering.

A. Yes.

Q. Over what period of time did each of those cards extend?

A. From the original date that the box was rented to the date it was surrendered.

Q. Have you those cards covering the period, say, of 1948, 1949, those two years?

A. Yes, sir.

* * * * * *

Q. Those two cards that are now marked Defendants' X for identification: Do those cover the record of visits [fol. 507] to that vault 1777 from the period of its opening to the date of its surrender?

A. Yes, sir.

* * * * * *

Q. Now, Mr. Witness, when was box No. 1300 opened and closed, if your records indicate?

A. I don't have that card.

Q. Mr. Ferguson hands me another card. Here is another one. Can you use that to tell us.

A. This box was opened in the name of Henry Grunewald or Mrs. Christine M. Grunewald, July 10, 1944 and surrendered February 4, 1954.

* * * * * *

By Mr. Corbin:

Q. The two cards constituting Defendants' Exhibit AA for identification and which I now show you are records of your bank that reflect the visits to box 1300. Is that right?

A. Yes, that is correct.

* * * * * *

Q. I show you the same with reference to Exhibit BB for identification. Does that reflect the record of box 1788 (handing)?

A. Yes, sir.

Q. And is the legend on the back referring to it as box 1782 an error?

A. I think it is poor penmanship more than anything, sir.

Q. Well, it is actually the record of visits to box 1788?

A. Yes.

* * * * * * *

Q. I asked you about Mr. Stearns, who he was, but failed to mention Mr. Edward A. Martin, whose name was mentioned. Did you know who he was?

A. I think I testified I didn't know him personally. I knew him at one time by sight. I understood him to be an attorney.

Q. In Washington?

A. Yes, sir.

Q. Just to make sure, whether he is dead or not you don't know?

A. No, sir.

[fol. 508] Q. During all this period and back for many years, did Mr. Grunewald have a checking account in your bank?

A. Yes, sir.

Q. And had he had various other financial dealings with your bank throughout many years past?

A. Yes, sir.

* * * * * * *

ELIZABETH V. CUNNINGHAM, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination:

By Miss Goldman:

Q. Miss Cunningham, what is your home address?

A. 102-17 Roman Avenue, Forest Hills, Long Island.

Q. Where are you employed now?

A. The office of the Regional Commissioner, 90 Church Street.

Q. Well, during what period did you act as secretary to Mr. Bolich?

A. I think the latter part of 1946 through the early part of 1948, I would say.

Q. Was that at about the time Mr. Bolich went to Washington as Assistant Commissioner?

A. Yes, that is right.

Q. What duties did you perform for Mr. Bolich?

A. I answered his phone, gave him messages, general—anything he wanted done, filing, typing, various duties.

Q. Were you the one primarily responsible for answering incoming calls to Mr. Bolich?

A. While I was in the office, yes; unless I was at lunch, but during the time I was there, I was.

Q. Are you familiar with the name Captain Henry?

A. I have heard the name, yes.

Q. And in what connection did you first hear that name?

A. I believe I got telephone calls from a Captain Henry.

[fol. 509] The Court: You may answer for whom these calls were. Whom did they ask for?

The Witness: Shall I answer.

Q. Yes.

A. Mr. Bolich.

Cross examination.

By Mr. Aranow:

Q. Do you remember whether they were in the year 1946 or 1948?

A. No, sir.

EVERETT HARDING, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination.

By Miss Goldman:

Q. Mr. Harding, where do you reside?
A. In Arlington, Virginia.
Q. What is your home address?
A. 516 26th Road, South Orange.
Q. Where are you employed?
A. At the Hotel Washington, in Washington, D. C.
Q. And in what capacity are you so employed?
A. As assistant manager.

The Witness: These are bills of the Hotel Washington for the permanent files.

Q. Are these records pertaining to a particular suite?
A. Yes. The suite numbers on these records are 405, 406 and 407.

[fol. 510] Q. But you know from your records to whom this suite was rented?
A. Mr. Grunewald.

Q. About the occupancy of suite 405, 406 and 407 from March 28, 1948 to August 13, 1948?
A. These records show that Mr. Grunewald was occupying this suite during that period of time.

Q. First, Mr. Harding, I show you Government's Exhibit 61-A for identification and ask you what that is?
A. That is a registration card of the Hotel Washington in the name of Mr. Harry Woodring.
Q. Is this for some particular suite?
A. The suite number is 319, 320 and 321.

Q. Now, Mr. Harding, do you know who occupied the Woodring suite 319, 320 and 321, from November 22, 1948, to October 23, 1949, and 419, 420 and 421 from October 24, 1949, to October 25, 1950?

The Court: You are talking about two separate suites now.

Miss Goldman: Yes, the suites identified on Government's Exhibit 61 for identification.

The Court: Yes, all right. You may answer.

A. I believe Mr. Grunewald occupied the suite most of the time.

Q. Mr. Harding, I show you Government's Exhibit 62 for identificati and I ask you what that is.

A. These are hotel bills of the Hotel Washington in the name of Mr. and Mrs. D. A. Bolich. The suite numbers of these bills are 319, 320 and 321.

Q. From what date?

A. From the date of November 19, 1948.

[fol. 511] Q. Would you examine the record again, Mr. Harding?

A. The date shown here of the first occupancy was 9 1/48.

The Court: September 1, 1948.

The Witness: Yes, sir.

Q. Does that refer to this suite?

A. To 319—no. To room 851 at first, and then there was a transfer from room 851 to 319.

The Court: Is that one of the suites previously identified?

The Witness: Yes, sir.

The Court: And how long did that last?

The Witness: These records show here from November, 1948, to June 22, 1949.

The Court: What date in November?

The Witness: November 19th, sir.

The Court: November 19, 194——

The Witness: 1948.

The Court: I think that all these suites may be a little

confusing. Who was paying the rent on this particular suite during that period of time?

Mr. Corbin: You mean 319, 320 and 321?

The Court: Yes, 319, 320 and 321.

Q. Mr. Harding, can you tell from Government's Exhibit 62 for identification who was paying rent for the suite 319, 320 and 321? Can you tell from this exhibit?

A. Well, I have forgotten what the other name was on the other exhibit there.

Q. No. From the exhibit before you, Mr. Harding.

A. Well, Mr. Bolich paid the room rent in room 851.

* * * * * * *

Q. Mr. Harding, I show you Government's Exhibit 63 for identification and I ask you what those records are?

A. These are Hotel Washington records in the name of Mr. D. A. Bolich.

[fol. 512] The Court: They are copies of bills rendered to him?

The Witness: Yes, sir, these are the hotel copies.

* * * * * * *

Q. Now, Mr. Harding, do you know Max Halperin?

A. Yes.

Q. Do you see him in the courtroom?

A. Yes, that is Mr. Halperin (indicating).

Miss Goldman: May the record note that the witness has identified Max Halperin?

The Court: Yes.

(Marked Government's Exhibit 66 for identification, 67 for identification and 68 for identification, 69 for identification and 70 for identification.)

* * * * * * *

Cross Examination.

By Mr. Singer:

Q. These bills, Exhibit 71 in evidence: Each one of them has a registration card, is that right, with the exception of the last one in 1951, August 22, is that right?

A. Yes, sir, that is correct.

* * * * * * *

Q. Now, look at Exhibit 67, which is dated December 21, 1948. Isn't the handwriting on the one I have given you of December 21 the same as on Exhibits 66 and 70?

A. Yes, sir, I would say it was the same signature.

Q. That is right. And isn't that same situation true with respect to Exhibits 68 and 69?

A. Yes, sir. These all appear to me to be the same handwriting.

Q. And apparently they were not signed by Max Halperin, the person who——

Mr. MacMahon: I submit this witness is not qualified as a handwriting expert.

[fol. 513] The Court: All he can say is whether they look the same. He can't say, I take it, who signed what.

Mr. Singer: All you have to do is take a look at it.

The Court: He doesn't say Mr. Halperin signed the others.

Mr. MacMahon: He says the custom was that the patron signed them.

Mr. Singer: That is right.

The Court: I don't think you have laid the proper foundation. Perhaps you had better explore that a little more, Mr. Singer.

Q. I have shown you five of your hotel records marked Exhibits 66, 67, 68, 69 and 70 in evidence, and I ask you whether you can say that Mr. Halperin, Max Halperin, the person who you say you know, signed any of those registration tickets attached to those exhibits I have just enumerated?

A. No, sir. I do not know.

Q. But you will say, will you not, that as to Exhibits 71, wherever there is a registration card, Mr. Halperin did sign those?

The Court: Do you know whether he signed those or not?

A. If this is his signature.

The Court: But do you know whether he signed them or not?

The Witness: No, sir, I don't know that.

Q. So you don't know whether he signed any of these registration certificates or registration cards?

A. No, sir.

Q. Will you also note that on each one of the registration cards, which are marked Exhibit 71, with the exception of the bill which doesn't have it, there is an address 390 [fol. 514] West End Avenue, New York City. Is that correct? Check it with me, sir (handing).

A. Yes, sir.

Q. Do you note that in Exhibits 66 to 70 inclusive, there is no address West End Avenue; all there appears is New York, New York. Is that correct?

A. That is correct.

Q. Do you recognize the handwriting on any of these Exhibits 66 to 70?

A. No, sir, I do not.

Q. Let us go further with this. Exhibit 67 has the word "use" on it. What does that mean in your hotel?

A. It is a stamp we use when a person comes in, registers in the hotel rather for a room to use for the day.

Q. It is a day rate?

A. Yes, sir.

Q. Which would normally be about half the full day and night rate. Is that right?

A. It means half rate, yes, sir.

Q. Am I correct that the same thing appears on Exhibit 69 of January 3, 1949?

A. Yes, sir, that is right.

Q. I find the same thing appears on December 31, 1948, Exhibit 68.

A. Yes, sir.

Q. And I find the same word "use" on Exhibit 70. Is that correct?

A. Yes, sir.

Q. So that so far the only one where it would appear that the occupancy was for the day and night would be this one of December 14, 1948?

A. Yes, sir, the full room rate was charged on that particular bill.

Q. Would you be able to tell from any of these records when the patron checked into the hotel or when this particular room was rented?. Take, for example, January 13,

1949. Am I correct that at the time when the room was taken was 3.32 p. m.? Am I right?

A. That is right.

Q. Can you tell when it was vacated?

A. At 5.52 the same date.

Q. And that is Exhibit 70. Is that correct?

A. Yes, sir.

Q. Look at this record for December 21, 1948. Does it appear as if the occupant or whoever it was checked in at [fol. 515] 1.45 p. m. and checked out at 2.41 p. m. on the same day, stayed there, used the room approximately an hour in the afternoon?

A. Yes, sir, that is correct.

Q. Take this one of December 14, 1948. Is it true from your records that the occupant came in at 12.19 p. m. and checked out the next—I don't understand this. Here is where I may be wrong. This is the one where there was no day rate, Exhibit 66. Is that right, no day rate?

A. It is not marked on there.

Q. It appears to be a charge for a full day?

A. Yes.

Q. The person who occupied this room came in at 12.19 in the afternoon of December 14th and left at 10.50 a. m., December 15th. Is that correct?

A. Yes, sir.

Q. And I have just been discussing Exhibit 66. Now, speaking of Exhibit 68, December 31, 1948, the occupant apparently took the room at 3.32 in the afternoon and stayed for two hours and 16 minutes, checked out at 5.48 p. m.

A. That is correct.

Q. And January 3rd the occupant came in at 3.28 p. m. and left at 7.13 p. m. on the same day, used the room about four hours?

A. Yes.

Q. You can't tell us, can you, of your own knowledge, that it was this Mr. Max Halperin, whom you see here in the courtroom today, was the person who used those rooms covered in Exhibits 66 to 70 on the days and on the times set forth in those records?

The Court: Do you want the question read back?
The Witness: Please.

(Question read.)

A. The only way that I could answer that question, sir, would be that Mr. Halperin in the courtroom now was the only Mr. Halperin that I personally knew that knew Mr. Grunewald. I do not know, I could not——

Q. Go ahead. In other words, you knew only one Halperin, who knew Mr. Grunewald?

A. Yes, sir.

[fol. 516] Q. From that knowledge you are drawing the assumption that these Exhibits 66 to 70, therefore, must relate to this Mr. Halperin, who is in the courtroom. Is that right?

A. That is the only——

Q. That is the only way you can say it. You don't have any personal recollection of Mr. Halperin being in the hotel on any of the days mentioned in Exhibits 66 to 70?

A. I could not swear, no, sir, that I saw Mr. Halperin on those particular dates.

Q. You do know that there were times when he came to the hotel and when his name was personally signed on registration cards as I have shown you by Exhibit 71?

A. Yes, sir, if this is Mr. Halperin's signature.

Q. Tell me, you were asked to look for all the records that you had of Mr. Halperin. Isn't that right?

A. Our records were turned over to the King Sub-Committee first and their own agents took the records from the files.

Q. So you don't know whether there are other records showing Mr. Halperin's stay at the hotel perhaps on the very days covered by Exhibits 66 to 70 in other rooms?

A. All of the hotel records of the Washington Hotel in Washington, D. C. were turned completely over to the King Sub-Committee. They were furnished a room where all of our records were available to them. They themselves took the records from the files.

Q. And beyond the records which they gave you or picked out for you, you did no selecting yourself, did you?

A. No, sir, personally, no.

Q. So you do not know of your own knowledge whether all of the records produced here show all of Mr. Halperin's stays at that hotel during 1948, 1949, 1950 or 1951. Isn't that correct?

A. That is right, sir.

Q. Now, if there is a charge for food service in a room, does the patron of the hotel sign the check, the food check, if it is charged to his room?

A. Yes, sir.

Q. What happens or what did happen to the food or other service checks, if any were signed by the patrons for [fol. 517] the rooms covered in Exhibits 66 to 70 inclusive?

A. You will have to ask me that question again. I am sorry.

The Court: Read the question.

Mr. Singer: No, I will withdraw the question. If there is no charge on here, then the time has been wasted in that connection.

Oh, I will go to another subject.

Q. Exhibit 66 shows four telephone calls, two for five cents each, and two for ten cents. What would that be, local calls?

A. They are local calls. The five-cent charges are the service charge of the hotel.

Q. I see no other charge on any of the others, so that this patron, whoever he was, in Exhibits 66 to 70, in all of these five stays never made more than two local calls, never ordered any food, never used any hotel service which was charged against him?

A. No, sir, just the phone calls.

Q. While you will note in Exhibit 71 the patron on August 28, 1950, had a restaurant, valet and four long-distance charges?

A. Yes, sir.

Q. And the patron, still talking of Exhibit on July 25, 1950, had two restaurant charges, two long-distance charges and one local call?

A. Yes, sir.

Q. And again on July 17, 1950, the patron had two long distance calls and two charges for room service or some kind of restaurant?

A. Yes, sir.

Q. On July 10, 1950, the patron had a restaurant charge?

A. Yes, sir.

Q. And on June 19, 1950, the patron had two restaurant charges and two long-distance charges?

A. Yes, sir.

Q. And on July 20, 1950, the patron had at least four long-distance calls and two restaurant charges?

A. Yes, sir, and six phone calls.

Q. And six local phone calls?

A. Yes.

Q. Let me ask you: If your phone from one room to another in your hotel back in 1950, would that be a charge?

A. No, sir.

[fol. 518] Q. So that when you say local phone calls, it means the person in your hotel called some number outside of your hotel. Is that right?

A. That is right.

Q. Now, these were charges for a room occupied by somebody: Did you ever discuss with Mr. Max Halperin, this man sitting here in the courtroom—did he ever tell you to charge any bill of his to Mr. Grunewald at any time?

A. Not to me, no, sir.

Mr. Singer: That is all.

The Court: Who in the hotel approved transferring charges from one room to another occupant in the hotel?

The Witness: The assistant manager or the room clerk could also assume that responsibility, sir.

The Court: Would he have to get the approval of the man to whom the charges were to be made?

The Witness: Well, in most all cases, sir, the party who was paying the bill would be the one to authorize that.

By Mr. Singer:

Q. Well, in response to his Honor's question, did you ever talk to Mr. Grunewald and ask him whether he was willing to accept the charges for these bills, Exhibits 66 to 70?

A. Not to my knowledge, sir.

Mr. Singer: That is all.

By Mr. Corbin:

Q. Did you know Mr. Harry Woodring?

A. I have met Mr. Woodring, yes, sir.

Q. Is that Mr. Harry H. Woodring, who was formerly Secretary of War under President Roosevelt from 1936 to 1940, I think something like that?

A. Yes, sir.

[fol. 519] Q. You have seen them together, I assume, in the hotel?

The Court: Who?

Q. Mr. Bolich and Mr. Woodring on occasion at least?

A. To that question, sir, I will have to say I don't remember ever seeing the two men together.

Q. All right. Now, were you acquainted with and did you enter suite 319, '20 and '21 during the balance of 1948 and in the year 1949?

A. Frankly, sir, I don't ever remember entering suite 319, '20 and '21 while it was being occupied by Mr. Woodring and Mr. Grunewald. I don't ever remember going in the suite at all.

Q. Didn't you know that there was a secretary there, a lady secretary, that office furniture was moved down from the fourth floor to the third floor in November, 1948?

A. I believe the suite was changed from 319, '20 and '21 to 419, '20 and '21.

Q. That is beginning in October of 1949, when that change was made, when they went back up to the fourth floor, but I am talking about the end of 1948, from November to the end of 1948 and then during the year 1949 down to October. Don't you recall when they moved down from the fourth to the third floor in November of 1948, that a desk at least, typewriters, air cooling apparatus and what-not were taken down——

The Court: Let us ask the witness one simple question.

Do you recall any furniture being moved from one suite to the other?

The Witness: Yes, sir. Office furniture.

The Court: You recall office furniture being moved from one suite to another?

The Witness: Yes.

Mr. Corbin: Maybe I can handle it this way better. [fol. 520] Can't we agree, Miss Goldman, that the suite on the fourth floor that was occupied up to December of 1950 was in the Woodring name, and that the suite thereafter occupied was in Mr. Grunewald's name?

Miss Goldman: Yes, but it was up to October 25, 1950 that it was in the Woodring name and from October 25, 1950 to August 25, 1951.

The Court: On those last two dates, it was in the name of whom?

Miss Goldman: Henry Grunewald.

The Court: Is there any dispute upon those facts? If there isn't, why, let us have it conceded.

Mr. Corbin: That is right.

Miss Goldman: If Mr. Corbin agrees to that, I would then like to put in the records from October 25, 1950——

The Court: You come to that when your chance comes. It is Mr. Corbin's turn now.

Mr. Corbin: There was no controversy between Miss Goldman and me.

The Court: It is very hard to have a controversy with Miss Goldman.

The Court: Is that agreeable to you, Mr. Corbin? Can we stipulate that?

Mr. Corbin: Yes, I do agree that Exhibit 62 indicates that Mr. Bolich occupied Room 851 from November 19th to November 22, 1948. But the Room 511 that he occupied and registered into on September 7th was only occupied up to November 19, 1948.

He had 511 up to what time do you say, Miss Goldman?

Miss Goldman: 18th to October 19, 1948.

The Court: Did he occupy another room after that?

Miss Goldman: Yes, your Honor, 851.

[fol. 521] Mr. Corbin: Up to——

Miss Goldman: November 22, 1948.

The Court: All right, that is stipulated.

Mr. Corbin: So that we won't need this other record.

* * * * * *

Q. In any event, up to November 22, 1948, when Mr. Bolich had the two rooms on the upper floors, he paid the room rent and bills directly to the hotel, didn't he?

A. That, sir, I am sorry, I can't answer that. I don't know.

Q. Well, do you know whether he paid room rent as such for any use he made of the suite on the third floor, 319 to '21?

A. I am not positive of that, sir. I couldn't answer. I don't know.

Q. Does the same answer apply to the suite later taken on the fourth floor, 419 to '21?

A. I do not know of any financial arrangements that were made.

Q. Well, don't you know that you didn't charge Mr. Bolich directly for rent?

A. Yes, sir. The records show that, that there was no room charge on Mr. Bolich.

Q. But during that period there was an account in the hotel in Mr. Bolich's name, wasn't there?

A. Yes, sir.

Q. For such services, valet services, meals, long-distance or local calls and such things as that he was charged for, wasn't he, even though he was in occupancy of one of the rooms of the Woodring, Grunewald suite?

A. Yes, sir.

* * * * * *

By Mr. Singer:

Q. Look at these Exhibits 66 to 70. Do you notice the spelling of the name Halperin on there, H-a-l-p-e-r-i-n?

A. H-a-l-p-e-r-i-n, yes, sir.

Q. I show you the first four of Exhibit 71. Do you notice the spelling on them?

A. H-a-l-p-e-r-i-n in each case.

Q. In each case?

A. Yes.

[fol. 522] Q. Well, tell me, did you notice on the registration cards, where you have the registration cards of the other two in Exhibit 71 that the handwriting spells out H-a-l-p-e-r-i-n, isn't that right?

A. No. That is p-e-r-n.

Q. Yes. That is by your clerk typing on top, but I am speaking of the paper, the signature?

A. Well, I should say that is p-e-r-i-n.

* * * * * *

The Court: Is there any practice in your hotel for a desk clerk to make out a registration card at times or not?

The Witness: At the request of people if they know them, yes, sir.

The Court: Well, do you recognize any of the handwriting then as being the handwriting of any desk clerk in your hotel?

The Witness: I could not definitely recognize it, no, sir.

* * * * * *

Cameron H. Pulley, called as a witness in behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. O'Hara:

Q. Mr. Pulley, where do you reside?

A. In Washington, D. C., at 3700 Massachusetts Avenue.

Q. Are you sometimes known as Jim Pulley?

A. I am. That is a nickname that has been with me since I was 10 or 12 years old. Only my near relatives call me Cameron. Most of the people know me by the nickname of Jim.

Q. How old are you now, sir?

A. I am 69 years old last February 25th.

Q. Are you presently employed?

A. I am not.

Q. Do you know Henry Grunewald?

A. Yes.

[fol. 523] Q. When did you first meet him? In what year?

A. The latter part of 1946.

Q. Following your meeting him in 1946, did you have any association with him for the next few years?

A. I did.

Q. And for how many years?

A. It went on pretty regularly until the early part of 1949?

Q. Did Mr. Grunewald have office space in the City of Washington, do you know?

A. He used offices in the Munsey Trust Company Building.

Q. Was there any other space that Mr. Grunewald used in the City of Washington?

A. He had a suite of rooms in the Washington Hotel.

Q. During the period of time that you knew him, was it always the same suite?

A. No, he had a suite in the Washington Hotel out over Pennsylvania Avenue in the beginning.

Q. Do you know the number of that suite?

A. It was either third, fourth or fifth floor, and I am not sure which.

Q. Does 405 refresh your recollection at all?

A. Well, I remember the 5, but I do not remember which floor it was on.

Q. Do you remember that the last numeral in the three numerals of the suite was a 5?

A. Was a 5, yes.

Q. And that was the first suite that you had occasion to know about?

A. Yes, it was.

Q. After that, were there two other ones?

A. Well, I remember one other one on the opposite side of the building over F Street.

Q. Do you know what the number of that was?

A. Well, that was 19 or 20. I remember the last numbers there, but I am not sure which floor it was on.

Q. Did you have occasion to be in those suites?

A. I did.

Q. Were those frequent or infrequent?

A. Quite frequently in the suite over Pennsylvania Avenue, probably once a day for a few days, and then it might be several days when I would not have occasion to be there.

[fol. 524] Q. Did you assist Henry Grunewald in any way?

A. Oh, I suppose I did little jobs for him like going down to get the mail, run some errands like that occasionally, but not as a regular thing.

Q. Did you answer the telephone?

A. I answered the telephones in the suite out over Pennsylvania Avenue when he was not there.

Q. Do you know Daniel Bolich?

A. Yes, sir.

Q. Do you recall the first occasion that you met Daniel Bolich?

A. I met him in the suite over Pennsylvania Avenue.

Q. Can you tell us approximately when it was that you first met Daniel Bolich?

A. I think it was early summer or about that time in 1948.

Q. Do you remember the occasion on which you met him, the event that took place on that occasion?

A. Yes, Mr. Grunewald asked me to go by and visit or take care of Mr. Bolich while he was out of the suite, that he would be back to the suite about noontime, and I was to sit and visit with him and keep him company until Mr. Grunewald returned to the suite.

Q. And did you do that?

A. I did.

Q. And did Grunewald return to the suite?

A. He did, about noontime.

Q. Then will you please tell us what happened after noontime in the suite.

A. Well, Mr. Grunewald came in and I think some one or two people with him, and ordered some sandwiches, and

we had some lunch and drinks, and that went on, visiting, until I left about 5 o'clock.

Q. Do you know what the occasion of this particular day was that the people were gathered there?

A. I learned during the afternoon that Mr. Bolich was coming down as a preliminary way before his anticipated appointment as Assistant Commissioner of Internal Revenue.

Q. Do I understand that this was something in the nature of a party?

A. Well, I would say yes. It was among friends and all seemed to know each other.

[fol. 525] Q. Did you have occasion to see Mr. Bolich in either the suites after that?

A. I recall seeing Mr. Bolich only one other time in the suite, and that was up in the suite over F Street late one afternoon.

Q. Did Henry Grunewald have any nicknames?

Mr. Corbin: I object to that as immaterial and irrelevant, Judge.

The Court: Was he known by any other names? I will let that question stand.

Mr. Corbin: We can't try him for that any more than the witness could be tried for being called Jim.

The Court: The objection is overruled, in view of other testimony in this case. Was he known by any other name? Did he use any nickname so far as you know?

The Witness: I have heard him call himself Captain Henry.

Q. Did he ever use that with you in calling you?

A. I am not sure. He may have, but I don't recall it.

Q. Have you had occasion to be in either these suites when Henry Grunewald was making telephone calls?

A. Yes, I have heard him talking on the telephone, making calls, numerous times, and at sometimes when he would use the telephone, he would say, "This is Captain Henry." I didn't know whom he was talking to, but I do recall that sometimes he would use that expression.

Q. Do you know where and when you met Max Halperin?

A. I recall seeing Mr. Halperin several times in Washington, but I can't say that—I never recall ever having met Mr. Halperin. I have seen him, and he was pointed out to me as being Mr. Halperin.

Q. Where did you see him in Washington?

A. Mostly in the hotel lobby, Washington Hotel lobby.

Q. And approximately when would that be in time?

A. 1948.

[fol. 526] Q. Did you ever have occasion to discuss tax matters or cases with Henry Grunewald?

A. Yes.

By Mr. O'Hara:

Q. Now, I would like to have you state any discussions that you had during the interval of time which we have spoken about with respect to tax matters.

Mr. Singer: I object to it on behalf of all defendants other than Grunewald upon the ground it is incompetent, irrelevant and immaterial, and can only be binding on the defendant Grunewald if it is directly connected with any of the issues in this matter.

The Court: The objection is overruled and you have an exception. The testimony is taken subject to connection and, as I have previously said, and I will charge the jury in my charge, the question as to whether statements by one co-conspirator are binding upon others depends on whether the jury finds in fact they were parties to the conspiracy and in the second place whether the statement was made in connection with the conspiracy and with reference to the objectives of the conspiracy.

Mr. Singer: I respectfully except.

A. Mr. Grunewald has stated to me on more than one occasion, as I recall, that tax business was good business; he could take care of tax business to the advantage of the taxpayer, both as to time and to amounts.

Q. Did you ever hear him represent himself as an accountant?

The Court: Well, he doesn't know whether he was an accountant, he said.

Mr. O'Hara: Is your Honor sustaining the objection?

[fol. 527] The Court: I will sustain the objection.

Mr. O'Hara: Your Honor, here is a man that says he wants tax matters. Let us find out whether he represented himself——

The Court: That is not the issue in this indictment. Maybe a man who is not an accountant says he wanted to be consulted on tax matters. Even that isn't illegal, for a person to be consulted on tax matters, as a layman. A lot of them are doing it. I can't see that it has anything to do with the issues in the indictment.

Q. Do you know where Mr. Bolich lived in Washington at any time?

A. I understand he occupied one of the bedrooms in the suite, the suite over F Street.

Q. Whom did you understand that from?

A. Mr. Grunewald told me he was occupying it.

* * * * * * *

Cross examination.

By Mr. Corbin:

Q. Mr. Pulley, is the nickname Jim still prevalent with you?

A. Yes, it is.

Q. Where do you hail from?

A. I was born in Washington, Indiana.

Q. When did you if ever cease to be a Hoosier?

A. Well, I hope I never shall cease to be a Hoosier.

Q. What?

A. I hope I never shall cease to be a Hoosier.

Q. So you went to Washington, did you, at some time?

A. I was born in Washington, Indiana, by the way.

Q. Yes, I know, but you didn't mistake Washington, D. C. for Washington, Indiana, by any chance?

A. No, sir.

Q. That is a different place?

A. Oh, quite different.

Q. When did you get down to the Capitol City?

A. I went to Washington in 1933 to stay about three weeks and I am still there.

Q. Inauguration time?

A. No. It was after inauguration.

[fol. 528] Q. When did you go to Washington to stay?

A. 1933, after about three weeks.

Q. Yes, but that was just a visit?

A. No. I went there with NRA.

Q. What were you doing with NRA at that time?

A. I was there representing a Chicago garage association.

Q. Chicago what?

A. Garage.

Q. Garage association?

A. Petitioning NRA for a code under the National Recovery Administration.

Q. Well, that was a pretty big outfit you had on your list, wasn't it? That Chicago concern was a big outfit?

A. Yes; it was representative of the whole country.

Q. What is your trade?

A. My trade?

Q. Yes.

A. I have been in the oil and gas business, brokerage business.

Q. Down in Oklahoma, Texas?

A. Yes, sir.

Q. Louisiana?

A. Yes.

Q. Where?

A. Oklahoma.

Q. How long did you stick to that?

A. Until I came to Washington in 1933.

Q. About how long were you in the oil business in Oklahoma?

A. Well, from about 1915 or 1916.

Q. Up to 1933?

A. Through the First World War, and then up here I bought and sold gas, oil and gas properties and refinanced them for several years.

Q. Stock sales?

A. No; financing.

Q. Were you the capitalist who did the financing or did you seek capital elsewhere?

A. I sought capital for——

Q. Well, what was it? Promotion?

A. Well, no, I never engaged in promotion, as I understand it, as such, since I bought oil and gas properties for the Middle States Oil Corporation.

Q. That is a big outfit, too, isn't it?

A. It was at that time, yes.

Q. You bought lots of properties for that company?

A. I think over six million dollars worth of them.

Q. When was that?

A. 1920, 1921, 1922.

[fol. 529] Q. Did you make a lot of money out of that deal?

A. I made a part of a commission that was paid by Middle States on it, yes.

Q. The commission was paid to somebody else but you got a cut, did you?

A. That is right.

Q. When you came to Washington in 1933 and were around there, did you say three weeks?

A. No. I said it was my intention when I went to Washington to stay three weeks.

Q. But having gotten there you liked the town, did you?

A. Yes, I liked it.

Q. Changed your mind and decided to camp out there permanently?

A. Well, it took longer to obtain the code than we had planned on. So I stayed until that code was approved by the President.

Q. Did you visit the President personally?

A. Oh, no.

Q. Who was the President then?

A. Mr. Roosevelt.

Q. Well, weren't you acquainted with him?

A. No, sir, I never met Mr. Roosevelt personally. It wasn't necessary for me to do so in my duties.

Q. I see. Well, what do you call yourself? What is your

business? How would you term it if somebody should say what is your business, what would be your answer?

A. Well, now, I could say that I am working with a foundation.

Q. You are not speaking of the Government now?

A. No. I have never worked for the Government directly or indirectly.

Q. Well, you are here at the Government's request, aren't you?

A. Well, on this matter I understand I am, yes.

Q. But what is this foundation that you are working for now?

A. It is an attempt to establish a permanent world fair.

Q. Well, it is in existence or in the clouds?

A. It is in the clouds mostly now.

Q. Do you feel quite optimistic that it is going to materialize to your benefit?

A. I do indeed.

[fol. 530] Q. Well, now, what was your business in 1946 when you say you first met Mr. Grunewald?

A. Well, we had just closed a company I was with then known as the Marine Salvage & Equipment. That was a company that engineered and designed marine salvage equipment. I was vice-president of that company.

Q. Were you a ship designer?

A. No, I wasn't an engineer.

Q. What were you besides vice-president?

A. General manager for the company.

Q. Vice-president and general manager? What was your function? What did you do? What was your particular talent that you gave to the company?

A. Management.

Q. So that would you call yourself if you were being asked by some outsider, would you call yourself a manager of corporate enterprise?

A. I think that would be a good name.

Q. It sounds good anyway?

A. Yes.

Q. Now, as such, were you running errands for Mr. Grunewald?

A. Well, that was before I met Mr. Grunewald.

Q. Oh. Well, I was wondering about after you met him. Did your stock go up or down?

The Court: Well,——

Mr. Corbin: Withdrawn.

Q. After you met him what was your job with him?

A. I had no regular job with Mr. Grunewald.

Q. Did he hand you a dollar now and then?

A. Oh, yes, he did. He loaned me money to carry on with. Yes, he did that.

Q. And of course, you paid him back in full?

A. I haven't paid him back yet. I signed notes for it, but I haven't paid those notes yet.

Q. Well, you aren't up here to New York for the purpose of paying them, are you?

A. Not this trip.

Q. Is it your hope that you may be invited back to New York some time when you will take that matter up with Mr. Grunewald?

A. It is.

[fol. 531] Q. Well, now, these young men in the District Attorney's office talked with you, haven't they?

A. Yes, I have talked to Mr. O'Hara.

Q. Nice fellow.

A. Splendid fellow.

Q. And you told him substantially what you have told us here on the stand today?

A. Yes, sir.

Q. Did he tell you that he might ask you to come up to New York and tell the story after you talked with him?

A. Yes, sir.

Q. And here you are?

A. Here I am.

Q. You say you saw both, the first two suites at the Washington Hotel? You saw both of them?

A. Yes, sir.

Q. Was there a young lady secretary working for Mr. Grunewald in them?

A. Not when I was there.

Q. You mean to say that you missed the young lady?

A. I must have.

Mr. O'Hara: If your Honor please, there is no testimony about any young lady.

The Court: No testimony that there was a young lady. This witness said he never saw her anyway.

Q. Was there a desk, typewriter and office equipment in in the room in the suite?

A. There was in the suite over F suite quite some time after he had started occupying it, and during which time I was there very seldom.

Q. Now, the first suite was the one over——

A. Pennsylvania Avenue.

Q. Pennsylvania Avenue?

A. Yes.

Q. Well, were you in that suite at all?

A. Oh, yes.

Q. Wasn't there a desk and a typewriter and office equipment in there that you saw?

A. No, sir.

Q. You didn't see it?

A. There was a desk in the living room where the telephone was but not typewriter.

Q. Well, weren't there any steel files?

A. Not in that suite, as I remember.

Q. What besides running errands for Mr. Grunewald did you do for him? Anything?

A. Very little.

[fol. 532] Q. Well, were you paid for what you did?

A. Well, as I said, I told Mr. Grunewald I had no money to carry on and he loaned me money each month.

Q. I see. About how much?

A. About $250 a month.

Q. For how long a period?

A. Well, for a good part of 1947 and part of 1948. Then it was discontinued and then later taken up—I mean reinstated, up to the early part of 1949.

Q. Now, did you have any other income or means of living at all at that time?

A. No, sir.

Q. How did you happen to meet Mr. Grunewald anyway?

A. It was suggested that I see Mr. Grunewald on the

matter that I attempted to testify to a little while ago on the——

Q. Well, did you——

The Court: You can answer the question. Go on.

The Witness: On the executive clemency matter.

Q. Did you have something to do with or some acquaintance with the National Democratic organization?

A. National Democratic Committee?

Q. In Washington?

A. No, I had no official connection.

Q. Well, did you have some friend over there who told you that you might go over to see Mr. Grunewald and he might help you?

A. No, not in the beginning. I had a friend there.

Q. All right.

A. But he didn't suggest that I go and see Mr. Grunewald.

Q. And I suppose you still feel very grateful towards and very friendly with Mr. Grunewald?

A. I would say that my association with him was during that time pleasant and agreeable.

Q. And thereafter?

A. I haven't seen him.

Q. Why not?

A. I think he and I were both glad to terminate our association at that time.

Q. It wasn't due by any chance to your recollection of the moneys that he had loaned you, was it?

A. Loaned me?

Q. Yes, sir.

A. No, sir.

Q. He wasn't dunning you for repayment, was he?

A. He has never dunned me.

[fol. 533] Q. Have you ever offered to repay him any part of it?

A. I sent word to him through an attorney that as soon as I could I would pay those notes.

Q. When did you send that word?

A. At the time of my termination of association with him.

Q. Which was what year?

A. 1949.

Q. What part of the year?

A. March or April, as I recall it.

Q. Did you, Mr. Pulley, part with Mr. Grunewald at that time on a friendly or an unfriendly basis?

A. I think that the word friendship did not enter into it so far as I was concerned at least. We had——

Q. You didn't regard that he had been a friend of yours?

A. Oh, yes, I thought he had done the best he could.

Q. So far as you were concerned, you were friendly with him, weren't you?

A. I was.

Q. And at the time of your parting in 1949, did your feelings towards him change?

A. I was rather irritated at him. He called me on the telephone and bawled me out unmercifully.

* * * * * * *

The Court: Now, Mr. O'Hara, you are offering in evidence what?

Mr. O'Hara: I am offering in evidence Exhibits 34 and 36 for identification.

The Court: 34 and 36, as I understand it, are extracts from the testimony given by the defendant Max Steinberg before the grand jury in this district on April 6, 1954, and April 7, 1954.

Mr. O'Hara: That is right.

The Court: You wish to make some objection to the admission of these?

Mr. Rosenblum: Yes.

COLLOQUY BETWEEN COURT AND COUNSEL

* * * * * * *

Mr. O'Hara: May I say something? If, in fact, there is evidence from which this jury can find Steinberg was a member of this conspiracy, and if there is evidence from [fol. 534] which the jury can find that one of the elements of this conspiracy was concealment, then I say to your Honor that each of the co-conspirators is in the same boat, regardless of whether anyone—let us assume Steinberg

never performed an act of concealment himself. What we are trying to do here is show an act on the part of a conspirator when each is bound by the acts of the others.

The Court: Let me ask Mr. Rosenblum this. If there is sufficient evidence from which a jury could consider that this conspiracy, at least on the part of some of the conspirators, embraced the concealment, and there is certainly some testimony that Davis told these people not to talk about any of the things, not to let anybody know that the money had gone to Washington and so on, which might be considered by this jury as being something which would be an agreement on their part to conceal, then why isn't this admissible in evidence?

The Court: And then why isn't this admissible in evidence?

Mr. Rosenblum: If your Honor please, I think you will find a three or four years lapse——

The Court: That doesn't make any difference.

Mr. Rosenblum: No, I wasn't talking about that. I think there was a definite withdrawal. He retired. He went out to California, in 1950 or 1951. He changed his job as group chief in 1950. He retired. Then he was out in California. Unless there is something here to prove that for as many years as anyone lives, you might say, there was an understanding about it; then there would be some basis to support a claim that Steinberg had agreed as part of the conspiracy to conceal what had gone on.

The Court: As long as there was a conspiracy, that conspiracy goes on unless there is some affirmative act of withdrawal.

[fol. 535] Mr. Perry: There is a substantial body of law, of which the Krulewich case is a case we are most familiar with, which says that when the chief purpose of the conspiracy has been accomplished, the conspiracy is over.

The Court: Not if one of the purposes is the purpose to conceal. The Krulewich case specifically says so.

Mr. Perry: Let us test that against the facts——

The Court: I am not interested in the facts; I am interested in whether one of the purposes was to conceal.

Mr. Perry: Well, the first question is was that the pur-

pose when the conspiracy was in operation, and when he was part of it? That is your problem.

Now, assuming for the sake of argument that three years later Davis wants to conceal something: there is absolutely no rule of law, and I checked this, which says, given a conspiracy, given the operation of a conspiracy, if later on other members of the conspiracy deserted to some new purpose, that that is binding on the members of the original conspiracy. That is not the law.

Mr. O'Hara: You are assuming a new purpose?

The Court: The Krulewich case specifically says there was no evidence there from which the jury could reach that conclusion. It said if there was such agreement, then the decision would be——

Mr. Perry: When do you determine whether or not there was such an agreement?

The Court: Well, that is a matter I think I have to submit to the jury.

I have to pass upon it just as I would upon a motion to dismiss as to whether there is sufficient competent evidence on which the jury might possibly conclude and reach that determination, as I see it, before admitting these documents.

* * * * * * *

[fol. 536] NANCY HAIN, called as a witness in behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. O'Hara:

Q. Now, Mrs. Hain, we have attorneys sitting way over here, and I ask you to keep your voice up so as to be sure I can hear you back here where I am.

Now, Mrs. Hain, where do you live?

A. Silver Spring, Maryland.

Q. Do you know Henry Grunewald?

A. Yes, sir.

Q. How long have you known Henry Grunewald?

A. Approximately 15 years.

Q. Were you ever employed by Henry Grunewald?

A. Yes, sir.

Q. And can you tell us when that was, Mrs. Hain?

A. From June, 1949, to January, 1950, and from June, 1950, to February of 1951.

Q. And where were you employed?

A. Mr. Grunewald's offices in the Washington Hotel.

Q. And where in the Washington Hotel specifically?

A. On the third floor for a period of time, and on the fourth floor for a period of time.

Q. And do you recall the numbers of the rooms?

A. 319, 320 and 321; 419, 420 and 421.

Q. Are those identical suites on the two floors?

A. Yes.

Q. The physical layout of the suites is identical, is that right?

A. Yes, sir.

Q. Now, what were your hours in connection with your employment?

A. They were irregular hours.

Q. Do you know in whose name the suites were registered or if there were two names will you please tell us the names?

A. Yes, sir. The suite was registered in the name of Harry Woodring.

Q. Harry Woodring?

A. Yes.

Q. And that applies to both suites?

A. Yes, sir.

Q. Now, did you have any occasion to examine the bills for the suites?

A. Yes, sir.

[fol. 537] Q. What was the occasion for that?

A. That was part of my secretarial duties.

Q. To do what with respect to the bills?

A. To examine them to see that they were correct and to pay them if they were.

Q. And did you pay these bills?

A. Either I paid them or Mr. Burke paid them.

Q. And how were they paid?

A. In cash, as a rule.

Q. Where did you obtain the cash to pay them?

A. Mr. Grunewald either gave me the money or instructed me to take it from the file.

Q. Now do you know whether or not either of these suites was used at all for residential purposes?

A. Yes, sir. There was someone staying in one of them——

Mr. Aranow: I can't hear.

The Court: Speak up.

The Witness: Yes, sir. There was someone occupying one of the rooms part of the time.

Q. Does that apply to both suites?

A. Yes, sir, part of the time.

Q. And do you know who that was?

A. Yes, sir.

Q. Who was it?

A. Mr. Bolich.

Q. Did you ever receive any money from Mr. Bolich?

A. No, sir.

Q. Did Mr. Grunewald, to your knowledge, ever receive any money from Mr. Bolich?

A. I never saw any money given Mr. Grunewald.

Q. Now, on any occasion did you see Mr. Grunewald and Mr. Bolich at either of these suites?

A. Yes, sir.

Q. Together, I mean, both there at the same time.

A. Yes, sir.

Q. What occasions were they?

A. Sometimes as I was leaving the office in the evening Mr. Bolich would come in and Mr. Grunewald would be in the suite. On a couple of occasions when I came in in the morning they were just finishing breakfast.

[fol. 538] Q. Now, was there one of the rooms in the suite that was used primarily by you when you were employed?

A. Yes, sir.

Q. Were there any files, filing cabinets, in this room?

A. Yes, sir, there was one filing cabinet.

Q. Will you describe the cabinet itself?

A. It was one of the large cabinets that have the combination lock at the top.

Q. And what was contained in that cabinet?

A. Personal files of Mr. Gruhewald and various receipts.

Q. Anything else?

A. Oh, his checkbooks were there.

Q. Was any money kept in the cabinet?

A. Yes, sir.

Q. Did you have access to the cabinet?

A. Yes, sir.

Q. Did you have the combination of the cabinet?

A. Yes, sir.

Q. Can you tell us how much money was kept in the cabinet?

Mr. Corbin: May I have the time fixed and the occasion when the lady counted the money?

The Court: Yes, Mr. O'Hara, try to fix the times. I suppose it would be different from time to time.

Q. Did the amount of money that was in the cabinet vary from time to time?

A. Oh, yes, sir.

Q. Was there money in the cabinet during the time that you worked there in 1949 and into January 1950?

A. I believe that there was always some money in the filing cabinet.

Q. Can you tell us what approximate amount would be in the filing cabinet during the time that you were employed by Mr. Grunewald?

Mr. Corbin: I object to that.

The Court: State the largest amount and the smallest amount, what the range was.

[fol. 539] In that time you were employed there, what was the largest amount and the smallest amount that was in the cabinet?

The Witness: The amounts that were in there ran anywhere from $500 to $5,000, $6,000 or $7,000 at some times.

Q. Do you know Max Halperin?

A. Yes, sir.

Q. Do you see him in the courtroom?

A. Yes, sir.

Mr. O'Hara: Is that Max Halperin (indicating)?

The Witness: Mr. Halperin.

Mr. O'Hara: Will the record please note the witness has identified the defendant Halperin.

Q. Have you ever seen Mr. Halperin in Washington?

A. Yes, sir.

Q. Where in Washington?

A. At the hotel.

Q. And where at the hotel had you seen him?

A. In Mr. Grunewald's suite.

Q. Can you tell us when it was?

A. I believe it was in both periods of time. I am quite sure that I saw him there in the latter period around there from June of 1950 to 1951.

Q. Did you see him there frequently or infrequently?

A. He was there as frequently as anyone else, probably a little more.

Q. Can you tell us, say, in the period of June 1950 to February 1951 approximately how many times you saw him there?

A. I am afraid I couldn't tell you a definite number.

Q. Did you see him there as many as ten times?

A. I think so.

Q. In addition to the payment of hotel bills, did you handle any other bills for Mr. Grunewald?

A. Yes, sir.

Q. And what were they?

A. Household bills and any other bills that he handed me to pay, I took care of for him.

Q. And how were they paid?

A. By cash or by money order, express money order.

[fol. 540] Q. Was that at Mr. Grunewald's instructions?

A. Yes, sir. He didn't like to pay by check.

Q. Did he say anything to you about payments by check?

A. He——

Mr. Singer: This is objected to on behalf of all the other defendants.

The Court: It is accepted subject to connection.

Mr. Singer: I respectfully except.

The Court: Go ahead.

Did he say anything to you about payments by check, and if so, what did he say?

The Witness: He said no record was kept of cash transactions.

Q. Were there telephones in both of these suites?

A. Yes, sir.

Q. Was it part of your duties to answer the telephone?

A. Yes, sir.

Q. Was it also part of your duties to on some occasions make telephone calls for Mr. Grunewald?

A. Yes, sir.

Q. You called various people for him?

A. Yes, sir.

Q. Did you ever call Daniel Bolich for him?

A. Yes, sir.

Q. Will you please tell us how you would place such a call?

A. I would call the number, I would ask to speak to Mr. Bolich, and when they asked who was calling, I would say Captain Henry was calling.

Q. Was that at Mr. Grunewald's instructions?

A. Yes, sir.

Q. Did you call other people and so identify Mr. Grunewald?

A. Yes, sir.

Q. Was Mr. Grunewald an attorney?

A. No, sir.

Q. An accountant?

A. No, sir.

Q. Did Mr. Grunewald ever discuss any tax cases or matters with you?

A. Yes, sir.

Q. Did he ever say to you whether or not he handled any tax cases?

A. Yes, sir.

[fol. 541] Q. What did he say to you in that regard?

A. He said that when people had tax problems, they bring them to him and that he would get them fixed.

Q. Did he use the word "fixed"?

A. Yes, sir.

Q. Did he say that to you on one occasion or more than one occasion?

A. More than one occasion.

Q. Did there come a time when you were subpoenaed to appear before a grand jury?

A. Yes, sir.

Q. Where was that grand jury?

A. In Brooklyn.

Q. Do you recall approximately when that was?

A. That was in 1952, in May or early in that area of time.

(Government's Exhibit 72 marked for identification.)

Q. I show you Government's Exhibit 72 for identification and ask you if you can identify it (handing).

A. That is the subpoena that I got to the Brooklyn Grand Jury.

The Court: What was the date of the subpoena, Mr. O'Hara?

Mr. O'Hara: I am going to offer it later, your Honor. It was served May 13, 1952.

Q. Now, subsequent to the service upon you of this subpoena, did you have any conversation with Mr. Grunewald?

A. Yes, sir.

Q. Will you please tell us approximately when that was in relationship to the time that the subpoena was served upon you?

A. Right after the subpoena was served.

Q. Did you see him?

A. No, sir.

Q. You did have a conversation with him?

A. On the telephone.

Q. Did Mr. Grunewald call you or did you call him?

A. Mr. Grunewald called me.

Q. Did you recognize Mr. Grunewald's voice on the telephone?

A. Yes, sir.

[fol. 542] Q. Will you please tell us what the conversation was that you had on the telephone with Mr. Grunewald on that occasion?

Mr. Singer: Objected to on behalf of all of the defendants other than Grunewald upon the ground that it is incompetent, irrelevant and immaterial and not binding on them.

The Court: The objection is overruled. It is taken subject to connection in accordance with my previous instructions to the jury.

Mr. Singer: I respectfully except.

The Court: Go ahead, you may answer.

What was the conversation?

A. He told me that I should get an attorney, he thought that I needed an attorney, and he suggested the names of——

Mr. Corbin: I can't hear you.

The Court: Can you speak up louder?

The Witness: He told me that I needed an attorney, that I should get an attorney. He suggested several names that I could call, and he told me that I didn't need to tell the grand jury anything about his personal business because, as his confidential secretary, I didn't have to divulge any of his business, and some of the lawyers were in Washington, whose names he suggested, and there was a lawyer here in New York.

Q. Was there anything else that was said in this conversation that you recall?

A. He said he was going to send me some money, he knew that I couldn't go up there on my own, and I told him I didn't need it, but he said he would send it anyway.

Q. Was there anything else that he said in connection with the conversation other than the mention of the money that you have not told us?

A. I didn't hear you.

[fol. 543] Q. Was there anything else that he said in this conversation that you have not included in what you have just told us?

A. He told me about the attorneys and about sending me the money and that I didn't need to discuss any of his personal business with the——

Mr. Aranow: I am sorry, I can't hear.

The Court: Will you speak up a little bit? The last thing she said was she didn't have to discuss his personal business. Meaning discuss it with whom?

The Witness: With the grand jury, that I didn't need to discuss it, and he said that I could just say I didn't remember.

Q. I believe you said that money was mentioned in the conversation. Is that right?

A. Yes, he said he would send me money.

The Court: Where were you at this time?

The Witness: I was working. They served a subpoena on me while I was working.

The Court: In Washington?

The Witness: Yes, sir.

Q. Subsequent to that time, what happened next?

A. Mr. Burke brought me the money that night and brought me $60, I believe it was, $60 or $65. I don't remember exactly.

Q. And what did you do next?

A. The next morning when I went to work I consulted my employer, who was an attorney, as to what I should do, and he told me——

Mr. Corbin: I object to that.

Q. Mrs. Hain, I do not wish you to state any conversation that you had with your attorney. You say you talked to your employer who was an attorney, is that right?

A. Yes, sir. He told me——

[fol. 544] The Court: No, you need not say what he told you.

Q. After talking with him what, if anything, did you do?

A. Oh, I sent the money back to Mr. Grunewald with a letter saying that since I had been subpoenaed by the grand jury they would take care of my expense. I sent the money back by registered mail.

Q. Now, subsequent to that time did you go to Brooklyn?

A. Yes, sir.

Q. Whom did you see in Brooklyn?

A. You mean the attorney's name?

Q. Yes. You went to Brooklyn to the United States Attorney's office?

A. Yes. I went to see Mr. Parker, and Mr. Kennedy and Mr. Percy, and there was a special agent there. I believe his name was Sullivan; I am not too sure about that.

Q. And did they question you on that occasion and did you answer their questions?

Mr. Singer: I object.

The Court: Objection overruled.

You may answer. Did you answer their questions?

Mr. Singer: Exception.

A. Yes, sir.

Q. Did you answer all the questions they put to you?

Mr. Singer: That is objected to on the same ground.

The Court: Overruled. You may answer. Did you answer all the questions they asked you?

The Witness: I didn't remember some things.

The Court: You didn't remember some things? You said that?

The Witness: I think I did.

[fol. 545] Q. Did you go before the grand jury?

A. No, sir.

Mr. O'Hara: That is all.

The Court: Wait a minute. You say you didn't remember some things. Is that what you said in answer to some questions, that you didn't remember?

The Witness: Yes, sir.

The Court: Was that a truthful statement?

The Witness: Well, I wasn't under oath and it wasn't quite so truthful.

. . . . . .

Cross examination.

By Mr. Corbin:

Q. Lady, would it be all right if I asked you how old you are?

A. Yes, sir. I am 39.

Q. Not 40?

A. My birthday is the 24th of this month.

Q. You told the jury and the judge about the quarters that you worked in at the Washington Hotel for Mr. Grunewald.

A. Yes, sir.

Q. Can you describe the furniture and the equipment in the room in your own way?

A. Well, there was one bedroom that had twin beds. That was on the far side of the suite. That was on the 15th Street side. Then there was the living room. That was furnished with the usual hotel furniture plus a few personal belongings. And then there was the room I used as an office which had a regular desk with a typewriter in it, and the drawers that lock, and a file cabinet with the combination lock, a dresser and a double bed. There were two closets in the room, in that room I used as the office.

Q. And the filing cabinet was a steel cabinet?

A. Yes, sir.

. . . . . .

Q. Well, you knew, then, or learned sometime during your regime that prior to the Washington Hotel days Mr. Grunewald had had an office at the Munsey Trust Building?

A. Yes, sir.

[fol. 546] Q. And a secretary over there?

A. Well, I don't know whether he had a secretary but I think that he used the secretary that was there.

Q. You mean he occupied that suite in the Munsey Building in association with someone else?

A. I don't know that he occupied it with someone else. I know that he went over there——

. . . . . .

Q. Where did Mr. Grunewald live during the times you were with him?

A. At the Westchester Apartments.

Q. And did you know from any source or in any way that he had lived there in the Westchester apartments for many years?

A. He told me that he had lived there for many years; he was one of the oldest residents there, he said.

. . . . . .

Q. Now, you have mentioned Mr. Burke as having brought over $60 or $65 cash to defray your expenses to

New York, if you wanted to go to New York to see the lawyer that had been mentioned. Is that right?

Mr. O'Hara: I think that is an incorrect summation of what the testimony was.

The Court: It is an incorrect summation of what the witness testified to.

Mr. Corbin: Maybe I didn't hear it correctly.

The Court: Maybe you didn't.

Q. Did you say—maybe I am wrong—that Mr. Grunewald mentioned some lawyers that you might consult, giving you the names of some in Washington and one or more in New York?

A. Yes, sir.

Q. And that he said that he would send some money over to pay your expenses to New York? Is that right?

A. Yes, sir.

Q. Following that, Mr. Burke came over with, I think you said, $60 or $65 in cash?

A. Yes.

[fol. 547] Q. Which you accepted and later returned after you talked with your employer, the lawyer?

A. Yes, sir.

Q. The lawyer suggested that you return it by registered mail?

A. Yes, sir.

Q. Return receipt requested, I suppose?

A. Yes, sir.

Q. Did you do so?

A. Yes, sir.

Q. Did you hear anything from Mr. Grunewald thereafter?

A. I don't remember whether I talked to him after that or not.

Q. You don't recall any conversation or any meeting?

A. No, sir, I haven't seen Mr. Grunewald.

. . . . . .

Q. How much did he pay you a week?

A. He paid me—it depended on how much time I had worked.

Q. Tell us a little more about it.

A. A month would run anywhere from $250 to $300 a month.

Q. Now, were there occasions when you saw Mr. Bolich come in at night?

A. Yes, sir.

Q. What time would he come in when you did see him?

A. Around 6.30.

Q. What time did he leave ordinarily in the morning, if you know? Was he usually there or had he usually gone before you got there in the morning?

A. Yes, sir, he was usually gone early.

Q. Did you notice what if anything Mr. Bolich had in his room where he slept by way of luggage or personal clothing?

A. He had personal clothing there and family pictures and religious pictures, his religious things.

Q. Anyway, he used the room, as you knew it, nights?

A. Yes, sir.

Q. And was never there during business hours in the daytime, so far as you noticed. Is that right?

A. That is right.

Q. There was a telephone in his room, wasn't there?

A. Yes, sir.

[fol. 548] Q. Did you have anything to do with the payment of his bills?

A. The whole suite was on the one bill, the two bedrooms and the living room.

Q. And the rent for the room or the suite rather, including the room occupied by Mr. Bolich, was all in those hotel bills for the suite, which were paid by Mr. Grunewald, as you say?

A. Yes, sir.

Q. What I am thinking about are incidentals, such as valet service, meals and telphone long distance that Mr. Bolich put in. You didn't pay those, did you?

A. Oh, no. I think Mr. Bolich paid those himself.

Q. Did you say that you remember telephone calls to Mr. Bolich?

A. Yes, sir.

Q. Were those calls that you referred to on your direct examination to Mr. Bolich calls that were made to him locally—that is, in the City of Washington—or calls you made to him when he was somewhere other than in the city?

A. In the city. They were made to his office.

Q. No New York calls?

A. I don't remember any.

Q. I mean no New York calls to Mr. Bolich that you recall. Is that right?

A. Not that I recall.

. . . . . .

Q. He made no secret, so far as you were concerned, of having cash in the cabinet, did he?

A. No, sir.

Q. Was it your duty or did you have occasion in his service at times to actually count the amount of cash in the envelope or envelopes?

A. Yes, sir.

Q. You have spoken of man by the name of Mr. Burke?

A. Yes, sir.

Q. What was his first name?

A. Charles.

Q. What was his job?

A. He was a close friend of Mr. Grunewald's, and he drove the car for him and ran errands and did whatever Mr. Grunewald asked him to do.

Q. Did you notice anything happening at any time to indicate that he, Mr. Burke, knew or didn't know about this cash in the cabinet?

A. He knew it was there.

. . . . . .

[fol. 549] Q. By the way, is it within your information or knowledge that Mr. Burke is now dead?

A. Yes, sir.

Q. Is he?

A. Yes, sir.

Q. During the time when you were there, both periods,

is it true that Mr. Grunewald had callers during business hours at the suites?

A. Yes, sir.

Q. And occasionally would it happen that he would use the room occupied nights by Mr. Bolich for conferences with clients and visitors?

A. Yes, sir.

Q. Lady, you have told us of the use of the name Captain Henry by Mr. Grunewald. That was a common occurrence, was it?

A. Mr. Grunewald quite often identified himself as Captain Henry.

Q. That is both on the phone, and when callers came in they would address him occasionally, some of them, as "Hello, Captain"?

A. They generally addressed him as Henry, but on the phone it was Captain Henry, and in person it was generally Henry.

Q. All right. Now, Henry Grunewald was good to you, wasn't he?

A. Yes, sir.

Q. When you left, it was on account of your own illness at the time, wasn't it?

A. In 1950, yes, sir.

Q. The last period?

A. The first period.

Q. Oh, I see. And that was in January of 1950?

A. I believe so.

Q. Now, wasn't it in December of 1949 that you left, late in December, before Christmas of that year?

A. I don't think so.

Q. You are not sure?

A. No, sir.

Q. In any event, did you go to Florida?

A. Yes, sir.

Q. And went there on account of your state of health, is that right?

A. Yes, sir.

Q. And did Mr. Grunewald pay your expenses?

A. Mr. Grunewald paid my expenses to Florida in 1951; not 1950.

[fol. 550] Q. Well, you were absent from the end of December or the first of January of 1950, down to June of 1950, is that right?

A. That is right.

Q. Were you in Florida all that time?

A. I don't think so.

Q. In any event, did your know on your return in June of 1950 that he had had someone else doing your work, that is, pinch-hitting for you?

A. Yes, sir.

Q. And then you stayed the rest of 1950 up until I think you said February, 1951?

A. Yes, sir.

Q. And was it then that you became ill again?

A. I had been ill all that time.

Q. Oh, I see. But what I am getting at: There was no quarrel between you and Mr. Grunewald, was there, on your final leaving?

A. Not exactly a quarrel.

Q. Well, didn't he furnish you with some money to go to Florida again?

A. He furnished me some money to go to Florida but I was to look over his home and see that everything was in readiness for his coming to Florida.

Q. So you were actually doing something for him or intended to do something for him on that 1951 trip?

A. That is right.

Q. And did you do it?

A. I went over to the house and checked it, told the caretaker when he would be down, told him that I wanted the use of the limousine to meet Mr. and Mrs. Grunewald, and went to the chief of police, I believe his name was Chief Hale, at Val Harbour. I had to ask him for the caretaker's address, and I told him who I was and what purpose I was there for. Then I became ill and had to have an emergency operation.

Q. All right. I was asking whether before you left New York he furnished you with some money?

A. I was on business for him. So he paid my expenses.

Q. Of course. I am not being critical at all. I am just wondering about the facts.

A. I was in Washington; not New York. It was in Washington, not New York.

Q. Anyway, did he give you some money?

A. Yes, sir.

[fol. 551] Q. Was that the equivalent of three months' salary?

A. No, sir.

Q. Anyway, it was adequate for your purposes or a little more, wasn't it?

A. It was.

Q. And you were detained thereafter in Florida on account of the illness that developed there?

A. Yes, sir.

Q. And never returned to work for Mr. Grunewald, right?

A. Yes, sir.

Q. Now, did you at any time you were working for him feel that you were working for a dishonest man?

A. Well, I may have had some thoughts as to what he was doing—about not being quite honest.

(Last answer read at the request of Mr. Corbin.)

Q. You may have had some thoughts? Well, whatever those thoughts were you may have had, they didn't prompt you to quit him, did they?

A. Mr. Grunewald——

Q. Well, will you answer my question.

The Court: I think she is. Go ahead. Did it prompt you to quit him? That is the question.

The Witness: Mr. Grunewald was one of the few people who would put up with the odd hours that I could work and the days that I was absent; so I stayed.

Q. Now, you didn't really, lady, take seriously this conversation you say you had with him at one time and he spoke about the people with tax problems, when they came to him with them that he would fix them up? You didn't take that seriously, did you?

A. I thought he could fix up anything he wanted to.

Q. You didn't really believe, lady, did you, that Henry Grunewald was actually bribing any public officials in respect of tax cases, did you? And I am opening myself wide to you now. You can give me any answer your wish.

[fol. 552] Mr. O'Hara: Your Honor——

The Court: What she thought is no proof any way at all. She can answer whether she knew. If you want to ask the question you can. All right.

Mr. Corbin: That is all.

Cross examination.

By Mr. Singer:

Q. You say when you came to work it was in June, 1949, is that right?

A. Yes, sir.

Q. And anything you have testified to here was about things happening after June, 1949, is that right?

A. During the period——

Q. After June, 1949? That is all I am interested in. You say you saw Mr. Halperin. You saw him then after June, 1949?

A. Yes, sir.

Q. We are positive of that; no mistake about it?

A. Yes, sir.

Q. And not before it; not before June, 1949?

A. I wasn't working for Mr. Grunewald——

Q. I am not interested whether you weren't working with Mr. Grunewald——

The Court: Did you see Mr. Halperin before June, 1949, as far as you know?

The Witness: As far as I remember, no.

Mr. Singer: That is all.

Motion to Strike Testimony and Denial Thereof

Now I move to strike out all of her testimony with respect to all of the defendants other than Grunewald upon the ground that it is incompetent, irrelevant and immaterial and not within the issues of this indictment and not binding on any of the defendants.

The Court: Your motion is denied. You may have an exception. It is taken like the other evidence subject to connection in the case.

[fol. 553] Daniel Olsen, called as a witness in behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. O'Hara:

Q. Mr. Olsen, where do you live?
A. In Brooklyn.
Q. Where abouts in Brooklyn?
A. 132 Beekman Place.
Q. What is your occupation?
A. Carpenter.
Q. How long have you been a carpenter?
A. Oh, 35 years.
Q. Have you ever done any carpentry work at 617 Second Street?
A. Yes, I have been there on several occasions.
Q. Do you know who resides there?
A. Yes.
Q. Who does reside there?
A. Mr. Daniel Bolich.
Q. Did you have occasion to do any work in the upstairs bedroom or closet adjoining the bedroom at that residence?
A. I done a very small job there once.
Q. Can you tell us, to the best of your recollection, when that was?
A. I think it was September 28, 1950.
Q. Who asked you to do that work?
A. According to my best recollection, it was Mr. Bolich.
Q. What was it that Mr. Bolich asked you to do there?

Mr. Singer: That is objected to on behalf of all the defendants other than Bolich upon the ground that it is not competent and not relevant and not within the issues of this case, and not binding on any of the other defendants.

The Court: Objection overruled. You may have exception. It is taken subject to connection.

Mr. Singer: I respectfully except.

The Court: You may answer.

What did Mr. Bolich ask you to do there?

A. He told me to open up the base in the clothes closet for a compartment that could be used for a place to put away papers in.

[fol. 554] Q. Where was this baseboard you speak of? The base of what?

A. The base was—I cut out the base—

Q. Where is the base?

A. That is the base of the floor.

Mr. Singer: May I have the same objection to the whole line so that I won't interfere?

The Court: Yes.

Mr. Singer: I respectfully except.

The Court: Go ahead.

Q. Where is this base you are speaking of?

A. It is the board that goes around the floor, you know.

Q. Is that the molding that goes around the inside—

A. You see it inside in all houses. The base is about 8 inches wide and the molding is two inches wide, so that in that case the opening would be about ten inches or so.

Q. That would be what, the height or the width of the opening?

A. That is the height.

Q. Where was this in the closet?

A. It was to the righthand side when you open the door in the closet.

Q. And this is down at the bottom of the closet at the righthand side as you open the door?

A. That is right.

Q. When you took off that moulding, what was in back of it?

A. Well, you see, that was into the bathroom, and it was underneath the bath tub. There is an open space underneath the bathtub.

Q. When you cut the moulding out, it gave you access to an open space underneath the bathtub?

A. That is right.

Q. The bathtub adjoining the closet. Is that right?

A. Yes.

Q. Then will you tell us exactly what you did there?

A. Well, it wasn't much of a job. I took off the base and opened it up, and that is all, and put it back again. There is nothing more to it.

Q. After you did that, was it visible what you had done there?

A. Visible?

[fol. 555] Q. Could you see it as you were walking into the closet?

A. Not except you would know about it. That is the only chance there would be to find it, if you knew about it.

Q. Was anything said to you about whether it was to be visible or not?

A. No.

The Court: By whom?

Mr. O'Hara: By Mr. Bolich.

The Witness: No.

Q. What was it Mr. Bolich said to you about the construction of that space?

A. You mean for what purpose, what it was to be used for?

Q. Tell us what he said to you.

A. The only thing I remember was said was it was to be a hiding place for secret Washington papers.

Mr. O'Hara: That is all.

The Court: You may cross examine.

MOTION TO STRIKE TESTIMONY AND DENIAL THEREOF

Mr. Singer: I move to strike out all of the testimony of this witness so far as all of the other defendants are concerned, other than Mr. Bolich, upon the ground it is incompetent, irrelevant and immaterial, and not within the issues of this case, and not binding on any of the other defendants.

The Court: The motion is denied. You may have exception.

Mr. Singer: I respectfully except.

The Court: Any cross examination?

The Court: All right.

The Government has now rested and I am ready to receive any motions.

MOTION ON BEHALF OF DEFENDANT, GRUNEWALD FOR JUDGMENT OF ACQUITTAL, ETC.

Mr. Bennett: Your Honor, Mr. Grunewald is first in the indictment. So I suppose I ought to make motions on the record first on his behalf, and in the proper order I think a motion to strike is first in order.

[fol. 556] Your Honor has received throughout the case a great deal of evidence subject to connection. In fact, I think it was understood that whenever any testimony was offered relating to a circumstance or a conversation not in the presence of a particular defendant, that that was subject to connection and was, of course, necessarily subject to a motion to strike out.

Now, I think in so far as the defendant Grunewald is concerned we all know what the items of evidence are that relate to matters directly in his presence. I think before these last two or three witnesses, there were just three items in the entire case that bore directly on meetings with him. Hoffman met him once and was introduced. Hoffman met him again and was introduced. Davis said he met him and referred to $100,000.

That leaves all of the other testimony relating to matters not in his presence, even though a witness may have purported to recount what somebody told him was said by Mr. Grunewald, still as to all matters where the witness was not recounting a direct conversation with Grunewald or an event which occurred in his presence, I move to strike it out.

Now, there may be a technical requirement that I go through and specify each witness, but I think it would only

unduly prolong this, and I think your Honor understands that that is the only reason I don't enumerate it. I can if you wish.

The Court: No, don't do that.

Mr. Bennett: I think outside of the testimony that Mr. Pulley gave which related directly to Mr. Grunewald, the testimony of his late secretary, and the testimony to which I have referred of Hoffman and Davis, two introductions, and a third introduction—there may have been an odd bank record or something of that kind or a hotel man as to [fol. 557] occupation of the suite, that sort of thing, of course, would be matters in his presence, but outside of that evidence, we move to strike out all the other evidence in the case.

Now, I should perhaps explain briefly what my theory on that is, because in substance it will be equivalent also to a motion to dismiss, and I move to dismiss the first count of the indictment based on this same reason, that so far as the evidence of the Government goes, there are many cases in which a witness recounts something told to him by Halperin or told to him by Davis, and there may be things in those conversations which, taken as gospel, might lead to certain inferences unfavorable to the defendant Grunewald.

However, I stand on the proposition that you can't convict a man of anything except by showing what he did and what he said; and that you can't submit to a jury a question of conspiracy and permit them to find a conspiracy by such recounted hearsay statements. And I am using hearsay in the sense that anything not said or done in the presence of a defendant is hearsay.

It is the familiar rule with which your Honor is just as well acquainted as we all are that proof of a conspiracy must be established directly against the defendant. Otherwise, as one of the cases puts it, hearsay is lifting itself by its own bootstraps, as they say.

The Court: Am I right that you can establish the existence of a conspiracy by the testimony of a co-conspirator of his conversation with a defendant?

Mr. Bennett: Of a co-conspirator, yes, if he recounts a direct conversation with the defendant.

On that theory, I take it the evidence of Hoffman as to his two introductions, which I regard as worthless [fol. 558] to establish a conspiracy, and the evidence of Davis as to his conversation with Grunewald, is properly admissible against him. Whether it leads to anything is another question.

My view of that is that we have on this record, considering solely the question of whether Grunewald is a party to a conspiracy, one single statement. That is the statement of Davis, "I went down to Washington on such an occasion in the latter part of 1948, sometime I think about September or thereabouts, with Halperin. I met Grunewald. Halperin introduced me and Halperin said, 'Mr. Grunewald has agreed to take $100,000 in the Pattullo case.'"

That conversation is to my mind meaningless. There is no indication that there was any improper, illegal, wrongful purpose. We can't derive any illegal thought from the picture except by going to some other material which brings us into the hearsay rule.

So I say—and this is all I am going to say on the subject—that that claim of a conspiracy against Grunewald rests on that one single statement of Davis. In that respect, it is insufficient to enable any jury to draw an inference beyond a reasonable doubt that he was a party to a conspiracy.

Now, I further move to dismiss the first count upon the ground that there has been a fatal variance between the pleadings and the proof. We have an allegation in this indictment of one long continuing conspiracy beginning in 1946 and ending in 1954. The proof, on the other hand, has shown a series of acts, which taken in the most favorable view of the Government might indicate—well, I counted up the other night some 10 or 11 different conspiracies, which I have enumerated in a memorandum to your Honor and which I don't need to go over.

[fol. 559] The Court: I have read the memorandum during the lunch period.

Mr. Bennett: And you understand our theory on it, that if there was some wrongdoing that Steinberg was guilty of in connection with Hoffman, there has been no connec-

tion with the defendant Grunewald shown. If there was some wrongdoing on the part of Scherm with Hoffman and Davis, the utmost that it seemed to me, taken at its full face value, that that evidence would show would be an attempted extortion or a conspiracy to extort by Davis and Scherm, or Davis, Hoffman and Scherm. No connection with any of the other defendants, and certainly not with the defendant Grunewald.

I don't think, as a matter of fact, there is even connection there shown with Steinberg, so I think you have to put Steinberg into a separate conspiracy with Hoffman if you are going to charge him with anything.

The Gotham case is one thing, the Pattullo case is another thing. Any attempt, if there were an attempt, to influence witnesses to do one thing or another is an entirely separate, unrelated act occurring a couple of years later, done possibly on the part of Davis, possibly on the part of Hoffman, possibly I think some testimony suggests that Mr. Halperin told the witness it would be the wisest to stand on his constitutional rights.

The Court: There is also testimony that Mr. Halperin told the witness to change his testimony.

Mr. Bennett: I don't recall it at the moment, but that is something that I will leave to Mr. Singer.

What I am concerned with is that there is no connection with Grunewald shown to any such events, and that there is no intimation, even in the prior testimony, that he could have been party to any conspiracy envisaging the per-
[fol. 560] formance of such events, so that I see them all as separate, unrelated acts or conspiracies, if you will, on which he ought not to be tried and as to which there is bound to be an extremely prejudicial atmosphere created, harmful to him, so that the variance that occurs when all of those matters are embraced within the case is one which should be regarded as fatal. For that reason, the first count should be dismissed.

I also move to dismiss the first count on the ground that it is based on an ingenious device to extend the statute of limitations. The theory of it is that there was a conspiracy to bribe and to fix one or more tax cases back in 1948 and early 1949; that after those cases were successfully handled,

because one or another of the men involved had said to each other, "Now, keep this under your hat" in effect, "Don't go around talking," therefore, all other persons who might be conspirators or might be involved were forever after bound to everybody else in the group for all his future conduct and actions. Any one of them might go out in the future, lie, suborn perjury, commit murder, and everybody else would be bound by a sort of extension of the conspiracy to do anything under the sun that anyone might think would be helpful in connection with keeping the matter from discovery.

Now, our theory is that if there were on the Government's proof a case of conspiracy to bribe and fix tax cases, that was finished with and done in 1949, and that the evidence relating to "Don't tell anybody about this" is not sufficient to establish a continuing conspiracy forever after binding all of the conspirators to anything that anyone might do.

Therefore, there is no proof of any conspiracy down into the period embracing three years prior to the finding of this indictment. Therefore, the first count should be dis- [fol. 561] missed as barred by the statute of limitations, which is three years.

So that even if there be some thought that in some way the defendant Grunewald is connected with a conspiracy to influence the testimony of some witness in 1951, 1952 or 1953, it would be a very harmful error to submit to the jury the question of a conspiracy which is barred by the statute of limitations, together with such later proof—and the authority on that has been cited to your Honor. I think it is U. S. *v.* Siebrecht. It is in either my or Mr. Singer's brief—I forget which—but I am sure it is in one of them.

The Court: Was that before the Krulewich case?

Mr. Bennett: Before. In connection with the Krulewich case, I think the real sense of that Krulewich case is that it is against public policy, for one thing, to be finding indefinite extensions of the statute of limitations, and that ordinary conversations of people about "Let's not talk about this" don't lead to what the Court called an implied conspiracy.

Otherwise one man is at the mercy of another for all of

his life because he happened to be in one criminal act with him.

I think that that about covers the situation with respect to count 1, and I will ask your Honor's permission if something occurs to me later, to put it on the record, but I would like to go to count 3——

The Court: Yes.

* * * * * * *

I have referred at various times throughout these motions to a motion to dismiss. I think the technical language under the new rules is I move for judgment of acquittal, and I ask your Honor to consider my motions amended accordingly.

The Court: I will do so.

Mr. Bennett: Thank you.

[fol. 562] My view on counts 5, 6 and 7 is, very briefly, this.

There is no testimony which in any way connects the defendant Grunewald with any act done with respect to those witnesses. The only time he is brought into the picture at all is with respect to the visits of Davis and Hoffman which I have recounted earlier.

The Court: As I take it from my recollection of the evidence and what reading I have done, that same statement would be true as to all the defendants with the possible exception of the defendant Halperin.

Mr. Bennett: Possibly yes. I think that is so.

* * * * * * *

MOTION ON BEHALF OF DEFENDANT, HALPERIN FOR JUDGMENT OF ACQUITTAL, ETC.

The Court: Mr. Singer, are you next?

Mr. Singer: Yes.

On behalf of the defendant Halperin, first, I want to adopt each and every motion made by Mr. Bennett on behalf of Mr. Grunewald in so far as they apply to Mr. Halperin as if I had repeated them in his exact words.

In addition, I move first to strike from the record all testimony concerning acts, incidents, conversations or deal-

ings or statements made by any of the persons mentioned in this case, which acts, incidents or dealings or statements occurred before April, 1947.

Two, I move to strike from the record all testimony concerning any act, incident or dealing or statement by any of the defendants or witnesses or co-conspirators—and I add co-conspirators to my first application to strike out—which may have occurred, and here my application is divided into three grounds.

First, it is to strike everything which occurred after January 1949.

[fol. 563] Secondly, it is to strike anything which occurred after November, 1949.

Thirdly, it is to strike everything that occurred after September 1951, the date of the arrest of the co-conspirator Smith.

I also move to strike from the record all testimony concerning the Gotham Beef case or the related Berman matters, including the testimony of the witnesses Tobias, Berman and Greenstein, or the subjects of the Gotham Beef case or the related Berman matters.

I move to strike from the record the testimony of the witness Sadlowe, the witness Watkins, the witness Meehan, the witness Cunningham, the witness Harding, the witness Pulley, the witness Hain and the witness Olsen.

I also move to strike from the record the testimony of the witness Davis in so far as it relates to an incident which I shall describe as the Glover case incident and the testimony of the witness Greenberg on the same subject.

In that connection, on that very last subject, where this testimony was offered as an attempt to support the witness Davis' testimony by purported prior statements consistent with his testimony at the trial, I wanted to specifically point out to your Honor the distinction between this testimony—and I won't go into it any more than just a general statement of the basic law of the case—the distinction between the manner in which this testimony was put in and in the case cited to your Honor in 6 Fed. 2d, upon which the Government relied.

In that connection I specifically ask your Honor to look at U. S. v. Sherman, 121 Fed. 622.

I also point out that the testimony in the case cited to your Honor was of statements of an alleged co-conspirator made at the time of the shooting, almost coincidental with [fol. 564] the offense committed. The other statements offered were statements made the following morning in the Police Department or to police officers.

I point out that in this particular case, the jury was presented with a situation which I believe is as damaging and as prejudicial as it could be to this defendant or any other defendant on trial in this case, where a witness is permitted to testify, as Davis was permitted to testify, that he had authorized his attorneys to make hypothetical statements—quite different. The word "hypothetical," as I can interpret it, means a suppositional matter. It does not appear as if there were anything like a statement that is consistent with what the witness said here.

In addition to that, matter was presented to the jury, with the full staging as if a paper submitted to that witness prepared by people, Government agents, when he was not present, purporting to represent their conversation with people who were not called as witnesses, and he was permitted to be asked the broad question, "Does this paper"—which has never been examined or disproved or substantiated in any way—"accord with what you have said in this trial on the subject of these two matters?"

It further appears that the very first interrogation of this witness Davis on the subject of this purported hypothetical statement was——

The Court: Do you know offhand what page of the record those appear on?

Mr. Singer: Yes, I hope we have it. It is around page 2711 of the record, in that area.

I wanted to point out that the first question asked of the witness was: Was he at that time entering negotiations —and I think I am quoting the word exactly, the language almost accurately—toward cooperating with the United [fol. 565] States Government, which was entirely different from a theory of a prior consistent statement. There was every reason for that witness to fabricate his testimony then, as it would appear at this trial. So that this incident, with the offer, at least the submission of this document to the witness to examine——

The Court: Which was not admitted in evidence.

Mr. Singer: It was not admitted in evidence, and I don't believe he was permitted to answer the question that I asked, but this is the kind of a situation—and I say this with no attempt to characterize anybody's actions—but it was so staged as to give the jury the complete feeling that this witness, long before he had any opportunity, inclination or need to lie, had told the same story he told on the stand.

I have never even found any case where proof of prior consistent statements could be anything other than direct and not general.

So I say with respect to that testimony, the damage is so great that I can see no way to overcome its effect on the jury, and I renew in that regard my motion for a withdrawal of a juror and the declaration of a mistrial. I might say that I have never heard, and I don't think any reported case would permit a witness to say that what he had said before was like what he had said here.

It is not as if he said, "Did you say this before? Did you say that before?" Transcending or descending to particulars. Here it was a generality against which there is no possible defense.

I now move for a directed judgment of acquittal as to the first, the third, the fifth, the sixth, the seventh counts of the indictment upon the grounds first that the Government has failed to establish the allegations of the indictment by proof believable beyond a reasonable doubt as a matter of law or by the rule, which apparently is in effect in this [fol. 566] Circuit, that the Government has established these allegations by sufficient evidence to warrant the submission of the issues involved in these counts in the indictment to the jury for their determination.

Here I shall try to break up my argument or my motion with respect to Count 1. I further move to compel the United States Attorney to select which of the different conspiracies alleged in the first count he intends to ask your Honor to submit to the jury.

My basis for that is that it is apparent from what the Government has said in prior briefs that the statute of limitations with respect to the first count, as they have con-

ceded in argument, was three years; and if that were so, then assuming that even if we took both the Gotham and Pattullo situations together, and if we assumed that the purposes for which a conspiracy in connection with such matters was actually created and existed, every purpose for which that conspiracy could have ever existed ended in October or November at the very latest of 1949.

Here I have even extended the situation to the filing—even though I believe it actually ended on January 10th, in so far as Mr. Halperin was concerned, if he is involved in it, with the determination that no criminal prosecution was concerned. I am even for the purposes of this discussion willing to go to the point where the filing of Scherm's report late in 1949 or even 1950 ended all and any connection that my client could have possibly had with this matter, and that since the last act occurred at least three years before the filing of the indictment in late October 1954, that everything alleged and established in connection with the conspiracies, the so-called conspiracies, involving those two Pattullo and Gotham matters had ended and were finished. [fol. 567] Further in this connection, if we were to extend the limitations or extend the time of the conspiracy to September 1, 1951, which, too, is more than three years before the filing of this indictment—and I specifically picked the date of September 1, and it could be any date in September when Smith was arrested—we find at that time that not only was the conspiracy, if one existed, ended; but that all of the so-called conspirators had taken definite and affirmative moves to separate themselves from any alleged agreement that may have existed before that time.

The Court: What was the date of the filing of the indictment?

Mr. Singer: October 25, 1954.

I want to point out in this connection that it is quite obvious, and nobody may gainsay this, from the record and the record alone, that prior to the date of Smith's arrest, from the testimony of the very witness Davis, upon whom the Government relies, it was obvious and clear that Mr. Marks, Mrs. Segel and all of the other persons connected with Pattullo Modes, including the accountant Smith, had retained their own counsel and had in effect advised Davis that they were going to go along without him, and

that he had nothing further to do with them. That appears in the record.

Next, Smith said that he lied after he had been represented by his own counsel, the counsel of his own choosing, and the names are not important for this discussion, but they certainly were nobody with whom these defendants were connected in any way.

If we take the testimony of the other witnesses, they, too, had decided to go their own way and had nothing whatever to do with these defendants. Even the conspirators Davis and Hoffman and Schopick had busted up. They had separated in late 1950 or early 1951, and they were [fol. 568] no longer together in the practice of law. They had no relationship together.

Hoffman testified he was not on speaking terms with the other co-conspirator Davis. This conspiracy, if one existed, ended certainly a week or two before September 1, 1951.

Now, if that is correct, then, your Honor should be required to compel the United States Attorney to elect which of the two conspiracies, if we classify them first in that two groups, he is asking your Honor to submit to the jury.

In this connection—and we have urged this at the beginning, long before the evidence went to the jury—I wanted to point out to your Honor that on this point, the decision of the United States District Court on the motions made prior to trial are actually of no assistance because the motions are made in advance of trial, but the true test of what the Court is required to do comes from the evidence itself.

The Court: I agree with you on that point.

Mr. Singer: So it is not a question of overruling another judge.

The Court: No, I agree with you on that.

Mr. Singer: And I say it is now obvious that this was the situation where one had nothing to do with the other.

I wanted to point out how ridiculous actually it is to argue that anybody could form a conspiracy in 1947—and may I interpolate at this point that although the indictment says the conspiracy started in January, 1946; that means nothing because the proof here is that the first case that ever came into any discussion was in April of 1947,

so it is not just an allegation that means anything; it is proof.

I wanted to get that because that was something that had to do with some of the testimony of this other witness, this man Pulley, who had some discussion in January or [fol. 569] February of 1947, which I specifically made a motion concerning a moment ago.

But now to go back to what I was saying, it is almost childish to say that people could get together in 1947 to conspire to conceal from a Congressional Committee and grand juries, and to conceal from other people, when the fact of the matter is the Congress which created the Committee was not elected until the latter part of 1951; or if we take it the other way, certainly the Committee never was created until 1951.

How anybody could be said to have joined a conspiracy to obstruct the Committee, where the people who select it had not even been appointed, had not yet been elected, I can't understand.

Two, the grand jury in Brooklyn was not created—and here I may be in doubt as to my time—certainly not until after Smith's arrest in September of 1951. I may be wrong there. Even if it is earlier, it makes no difference. How anybody could say that I or anybody else could join in a conspiracy in 1947 to conceal from a grand jury in 1951 or 1952 passes understanding, passes at least my ideas of understanding.

Third, how could anybody agree that they would conceal from investigators a matter when the investigation itself was not commenced until three or four years after the event?

On that theory, as some other counsel has said here, the mere fact of joining an illegal enterprise would make you responsible for that enterprise or what its consequences might be 100 years from the time when it commenced.

The Court: Isn't that a question for the jury, though, to decide?

Mr. Singer: No, it is not. I respectfully say to your Honor it can't be. This is a question of plain, simple logic and understanding.

[fol. 570] So if the first conspiracy had ended, it was barred by the statute of limitations. Therefore, the Government is required to go to the jury on another or second of the conspiracies.

It is not always for the jury to determine whether there is one conspiracy or more. The Supreme Court said in the Kotteakos and Lecacos case, which I argued personally, that it was for the Court to determine.

Now, Mr. Bennett has pointed out that there were many conspiracies, which I agree with, but I was willing to limit my argument at this point to this situation. Now, it seems further in that connection that this theory of an agreement to conceal only exists within this instrument, which I would like to characterize, as somebody did in a brief in U. S. v. Ginsberg, as a camouflaged instrument. It has a purpose. The purpose is not to apprise the defendants of the charge against them, but more to confuse them, so that they may not be able to actually understand the nature and the consequence of the charge made against them. It is not the allegations of an indictment that controls; it is the proof.

It is a strange thing that even today in 1955, after five weeks of trial, not one co-conspirator has ever testified—not one, and there were several called here, some who had gotten immunity and some who were praying to go free, hoped to go free—that there was ever any such arrangement. But no, on the contrary, the situation is left so that it is for the jury to draw an inference.

I say to your Honor that if a prime conspirator—this is no business of sitting down at a table and drawing agreements in partnership—but here are people, these witnesses, who are now concerned with cooperating with the Government, and if the Government dared to say that they have concealed or they have lied, then there is no case to go to the jury.

[fol. 571] If the Government's theory is correct that these men are telling the truth, their failure to disclose any such agreement is conclusive and binding on the Government for all time and certainly binding on your Honor. It would be binding on the jury.

It would be quite different if this were a case completely of circumstantial evidence where inferences could be drawn.

But here you have, and I must say it, the principal architect of the scheme, who says he was the architect of the scheme, Davis, Hoffman, Smith, the others, and they say there was no such agreement.

Now, they go on to relate that they did certain things. They did not say that they did it in pursuance of any agreement. Here was the situation, as I analyze it.

The case closed; everybody had forgotten it. Several years later there is a Congressional investigation and somebody takes it in his head that he might be worried about it and he proceeds to start something entirely new, merely because—and I would like to give you the best example of it, where there is no statute of limitations.

Suppose this had occurred in 1920, and in 1950 some lawyers' or public officials' conduct had been questioned, and the people in 1955, thirty years after the incidents, had decided now they were going to try to conceal it. What relationship does one have to the other? Most logically, most reasonably and certainly none by agreement, and this is a case where the agreement has been testified to on the record and the record is completely void of it.

So, in so far as the statute of limitations is concerned, I think that we are entitled to a dismissal and a direction of a verdict on count 1 upon the ground that if the conspiracy was to fix cases, that ended prior to the statute of limitations. If it was to obstruct justice, there is no proof on it, and certainly [fol. 572] the first part would have to be entirely removed, taken from the jury's consideration, and the Government should be required to elect with respect to the second portion of it.

. . . . . .

With respect to the fifth, sixth and seventh counts, there I say there is no evidence whatever, first, with respect to the witness Marks——

The Court: Is there any testimony that Halperin talked to Marks?

Mr. Singer: Not only was there no testimony, but if you go to the testimony of the witness Davis, again the man upon whom the Government basically relies to send this

case to the jury, Davis says that before he went to see Marks, he was especially careful, and he and Schopick had discussed it, and he was especially careful, not to say anything to him which might ultimately be turned against him.

I, for the moment, am forgetting and leaving Halperin out of it entirely; I am adopting the Government's theory for this moment, that if Davis did and Halperin was responsible, we find the Government presents you, as the Judge, and presents the jury with a conflicting situation.

One of their witnesses says, "I never said anything to him; I was especially careful; all I wanted to do was to find out what he was going to do." The other gives some indication that he said, "Go and get another lawyer and take his advice." And that was the end of that.

So that with respect to count 5, certainly there wasn't any single thing in that which was wrong on the general theory, and certainly in so far as Halperin was concerned, there is no testimony.

The Court: On that, wasn't there some testimony—and this is what I want to get the page references as to in some memorandum sometime—that Halperin went to Marks when Marks said he was going to tell [fol. 573] the facts and Halperin said, "Better consult another lawyer" or something like that?

Miss Goldman: That was Tobias, your Honor.

Mr. Singer: Not Mr. Marks.

The Court: What is the testimony about any conferences between Halperin and Marks? Anything?

Miss Goldman: No, your Honor, but there is testimony as to a conference between Davis and Halperin as to how the Brooklyn grand jury should be handled and thereafter testimony as to conversations between Davis and Marks and Segel.

Mr. Singer: That is right, and Mr. Davis' testimony is that he went to Mr. Marks; he was very careful not to say anything to him, that he said nothing except to say to him, "Get another lawyer, take his advice," and that is all.

The Court: It was Davis who said that?

Mr. Singer: It was Davis who said that.

Mr. MacMahon: I don't think that is quite accurate.

The Court: I want to get the page references in a memorandum.

Mr. MacMahon: Miss Goldman has the page references here for you now, your Honor.

Mr. Singer: With respect to the witness Berman, I have examined his testimony today at pages 1258 and 1259. If you compare it with what Davis said on the subject—and I know it is a burden to throw on a judge the task of reconciling differences in testimony, but, as a matter of law, it has been so clearly established that if there are any basic inconsistencies, on this motion it must be resolved in favor of the defendant, if they exist at least on direct examination.

I have avoided any reference to cross examination in my discussion. Davis said he went to Berman and to Tobias and told them that "I am about to go before [fol. 574] the grand jury and I am going to tell the whole truth about this matter and I would advise you to do the same," and they said, "Well, we paid your fees and that is all there is to it."

Now, if that is the testimony which basically has to go to the jury, that is the Government's position, then, certainly, there is nothing in that that would warrant any conclusion that these men were deprived or threatened or intimidated in their right or duty to go there and testify.

And in that connection I wanted to point out this California case, and this is off the record.

(Discussion between Court and counsel off the record.)

Mr. Singer: So, when you look at this intimidation of witnesses, running through all that is the threat of lawyers, or even laymen saying to others, I am not going to testify, and I would advise you to rely upon your constitutional rights.

I want to go further: If it is possible that this advice to rely on constitutional rights was a fraud and a lie, in other words, if I advised Mr. Jones who had nothing to do with the matter, hadn't done anything wrong, to rely on his constitutional rights, somebody might say, well, that

is a fraud. But it is obvious from the Government's own proof in this case that everyone of these people, at least they admitted on the stand that they would have to admit guilt of a crime. And I personally as a lawyer and I think your Honor should as a lawyer feel offended at the imputation that the advice to anyone at any time to rely on his constitutional rights could ever be dragged down to the point where it could be characterized as even part of a crime. That to me seemed to be going a little too far and a little unnecessary.

[fol. 575] To sum these last questions up, and indeed, I wanted to go on to the Government's theory of conspiracy——

The Court: If you are going to go on to that, let me ask the Government what they say on this point of a lawyer, Davis, advising Halperin that they were not going to avail themselves of constitutional rights? Who on your legal staff is going to argue that?

Mr. MacMahon: Miss Goldman.

Miss Goldman: The Government takes the position that on the basis of the testimony of Marks, Segel, Berman and Tobias, there is sufficient evidence from which the jury can draw the inference that the witnesses named in Counts 5, 6 and 7 were not advsied to take their constitutional privilege, but rather were advised to refuse to testify, which is not only illegal, but a crime of contempt.

The Court: Will you give me a memorandum with the page reference?

Miss Goldman: Yes, your Honor.

The Court: Have you got it here?

Miss Goldman: I have the page references.

Mr. Singer: Now, I wanted to go back to this conspiracy theory, and here I wanted to say to your Honor, and perhaps it isn't a strict question of law, but I think since your Honor announced at one stage in my cross-examination of Davis that it was your theory, from the Circuit Court's opinion in this Circuit—I don't remember the case your Honor cited, and I am terribly sorry for that oversight at this point—you said in substance that if these acts were part of the conspiracy, there would be no separate consecutive sentence imposed in connection with them.

Now, if that be true, let us look at it from a practical viewpoint of the submission of the case to the jury: If this was part of the conspiracy, what is the [fol. 576] need of it entirely, except to further confuse matters. I am now forgetting for a moment, and if your Honor will permit me I would like to reverse our positions just for this second——

The Court: You are now saying I was right?

Mr. Singer: No. I say assuming it was so, and I say to myself, now, I have a five weeks' case, I have five persons, I have to submit to the jury this many issues of facts and this complex question of law; I am unnecessarily complicating it certainly by adding to it a theory that if the people committed a conspiracy and agreed to it, that therefore they were guilty on Counts 5, 6 and 7, because that in effect would have to be your charge, and I say when you do that you certainly are putting the jury in a position where it would be almost impossible for them to determine the issue.

Now, it isn't as if I was seeking relief from these three counts. As a matter of law I don't believe they can be submitted against Mr. Halperin, but it does seem to me from the practical viewpoint that it can more readily be considered and more readily decided by your Honor.

I can't see the sum and substance of a charge which would say to the jury, if these men were conspirators and these things were done, then they are guilty of them. If that was so, why was it necessary to make it a separate crime? Why was it necessary to charge them with having aided and abetted? Why was it necessary to draw the count in the specific way that it was drawn? It is true as the Government argues that you can submit it on two theories. That is true. But when you select the theory on which you are going to submit it, that is the one that the defendant comes in to court prepared to meet. That is the one the jury is going to try, and that is the aiding and abetting theory.

You see, when you are involved in a general discussion of law, that is one thing, but when you get [fol. 577] a specific charge—I have never heard before of

the theory that you could charge me on one theory and try me on another.

The Court: But you can have a situation where one count of the indictment is a conspiracy to do certain things, and then there are other substantive counts, which were substantive offenses which were committed pursuant to the conspiracy.

Mr. Singer: No, no. If you so charged it, you would be charging the jury, wouldn't you, on the element of reasonable doubt, each and every element of that offense, separate and apart from that in the language of the count, and that means you are saying to the jury, it is this count of this indictment that you are considering and not the general counts. Otherwise, you would be almost directing a judgment of conviction in a criminal case. Whereas, if there were substantive offenses all you would have to say is, if you find them guilty on this count, then you must find them guilty on the others, if they were in the conspiracy.

The Court: Not necessarily. I had one case that I tried where the people, certain people were convicted of conspiracy and one of the alleged co-conspirators was acquitted of the conspiracy, but he was convicted on the substantive count.

Mr. Singer: But you didn't charge there that guilt of the conspiracy was guilt on the——

The Court: No, you separate them.

Mr. Singer: But that is what the Government is asking you to do.

Mr. Heffron: The Government is asking no such thing.

Mr. Singer: That if you are guilty of conspiracy you are guilty of the substantive charges.

The Court: No. I have charged on that. I can distinguish those. I can admit to you, Mr. Singer, that it makes the charge much more difficult for the [fol. 578] jury to understand and the judge to write, but it can be done.

Mr. Singer: Now, one other and last point: I move that all of the testimony with respect to the Gotham Beef case be stricken from the record upon the ground, as evidenced from the testimony of the Government witnesses Berman, Tobias and Greenstein as well, that each and everyone of

them said that there was no illegal agreement, that they did not intend to break any law, they never paid one penny for anything improper, unethical or wrong, and that as far as they were concerned they were paying fees, and since they are witnesses, these three of them, who were given immunity and presented to this jury as people upon whom the Government relied and whom the Government believed, that that theory on the testimony of these witnesses cannot be changed; if they are presented to the jury at all they must be presented upon the testimony which these witnesses gave, which negatives the theory of corruption, fixing, bribery, intimidation, improper influence, or anything else charged in the indictment.

So I say for all the reasons I have urged, on each and every count of this indictment, there should be directed a judgment of acquittal under the statute of limitations and for all the other reasons I urged.

The Court: All right. Who is next?

Mr. Bennett: I think it may help if I just put in the fact that I join in Mr. Singer's motions in so far as they have not been covered by me and in so far as they are not particularly applicable to him, and I would like to give your Honor a three-page reference.

The Court: Give it to Mr. Spiegel.

* * * * * * *

[fol. 579] The Court: Let me ask you on that, because this is an important part; What overt act occurred within three years prior to the indictment other than overt acts in connection with, let us say, concealment? Anything?

Mr. Heffron: None, your Honor, but none are required. I think in the first place a distinction should be noted which exists between a conspiracy as defined in 18—371, Title 18, which requires the commission of an overt act to complete the crime, and a conspiracy which consists of a substantive conspiratorial agreement under 4047, which doesn't require an overt act, and we have referred in our brief to two cases, the Nash case and the Singer case, both involving conspiracies and statutes which do not have the requirement of an overt act. The Supreme Court held that the

existence of a continuing conspiratorial agreement itself is sufficient to constitute the crime.

The Court: Do you have to establish that the conspiracy was continuing, whether there is an overt act or not, during that period?

Mr. Heffron: Yes, we have to establish that it was continuing into the period, but the acts committed need not be the acts of the revenue agents who were parties to the conspiracy; if they were the acts of co-conspirators with whom the revenue agents conspired, then those acts are equally binding on the revenue agents, and I would refer your Honor particularly to the language which reads, who conspires or colludes with any other person to defraud the United States.

The Court: Well, let me ask you this: what acts took place within, let us say, three years, other than the acts relating to so-called alleged concealment? Any acts in connection with the conspiracy by those revenue agents?

Mr. Heffron: None. But, your Honor, the acts of concealment—these were, of course, a part of the original con- [fol. 580] spiratorial agreement. They are just as valid as acts pursuant to the conspiracy, as acts of a non-concealing nature.

The Court: All right. Now, let me ask you this: Where is the proof that the parties entered into an agreement to conceal?

Mr. Heffron: We have a memorandum which will be submitted to you setting forth the evidence on which the jury may conclude that it was a part of the original conspiratorial agreement from the beginning that they were to expressly among themselves conceal in furtherance of the purposes of the conspiracy, and our memorandum covers a period from May, 1947 down through March, 1952, which is well within any statutory period applicable here.

The Court: Now, where is the proof, let us say, that Mr. Scherm even if he became a party to the conspiracy to defraud also became a party to a conspiracy to conceal?

Mr. Heffron: Well, the fact that he joined the conspiracy to defraud knowing that the terms of this conspiracy to defraud carried with it an agreement to conceal, he is bound.

The Court: Where is the proof that he knew it carried that?

Mr. Heffron: Our position, your Honor, is based on the references to the record, to the evidence which has been introduced, that a jury may infer that when Mr. Scherm joined the conspiracy he joined with knowledge of all of the purposes and of this agreement to conceal.

The Court: Well, don't you have to have more than that? Don't you have to prove that all of the conspirators knew of the objectives? They may not have known of the definite things, but they knew of the objectives. For example, they knew of the objective to fix tax cases; not necessarily a particular case, but the objective to fix tax cases. They [fol. 581] knew of the objective to conceal their acts. Now, when a conspirator comes into that, don't you have to have affirmative proof that he knew both of those objectives?

Mr. Heffron: You have to have affirmative proof from which the jury may conclude as reasonable men that that was an objective of the conspiracy, and that he knew that at the time he joined. You don't have to have an express status report to each particular co-conspirator as he enters that these are all the terms, expressed to him in that manner. It is what the evidence itself shows and whether the jury can reasonably conclude that at the time he joined he had knowledge of that purpose.

The Court: But you have to have, it seems to me, some evidence that that situation existed. I would be interested in seeing your memorandum on that.

Mr. MacMahon: I have a memorandum on it, sir.

The Court: I am concerned with this reference to Mr. Scherm and Mr. Steinberg, for example, particularly, that they entered into the conspiracy what proof is there that they entered into the conspiracy; what proof is there that they entered into the conspiracy knowing that the purpose was to conceal? Not that there was an inference, which the Krulewich case says is not sufficient, but an express purpose to conceal? Now as to the other defendants I think the proof may be a little bit clearer, but as to Scherm and Steinberg I am a little concerned as to whether there is any proof at all that they knew that that was one of the objectives of the conspiracy.

Mr. Ferguson: Now, the method by which this arrangement was set up as between Hoffman, Steinberg and Scherm, was to go over and ask for the $40,000. That in and of itself is affirmative proof, but on that basis the jury may conclude that in view of the method used by the co-conspirators to effect this transaction that they knew of [fol. 582] the terms which existed in the conspiracy, that there was to be concealment.

The Court: Well, isn't that the same situation that the Supreme Court referred to in the Krulewich case?

Mr. Ferguson: No, it is distinguishable from that situation. There, as I understand the Krulewich case, the problem is whether by the mere fact that you have in existence a conspiracy without——

The Court: A wrongful act?

Mr. Ferguson: (Continuing) ——any evidence whatsoever in the record or charge in the indictment, that concealment was any part of it. The Court will imply that every conspiracy by its nature must include a term of concealment.

The Court: Not that the Court will, but whether it will allow a jury to conclude merely on this basis alone that that is an objective of the conspiracy.

Now, as I read the Krulewich case, they said it needs more than that. It needs some proof that that was an objective other than the mere fact that they entered into an illegal agreement and the assumption that all illegal agreements will be kept concealed.

Mr. Ferguson: We have more than a mere illegal agreement. We have evidence in which we say the jury, notwithstanding the Krulewich case, can infer that they knew of the term.

Now we have evidence that Scherm was in there expressly from 1947 in this conspiracy, and it isn't a question of implying from the mere existence of the conspiracy, but a question of whether on the evidence we have concealment. You may infer that that was a term of the conspiracy. And we submit they are two entirely different situations as set forth in the brief submitted to your Honor two days ago, and our position is supported by the cases cited therein.

Mr. Rosenblum: May we have copies of those briefs?

[fol. 583] Mr. MacMahon: There is evidence in the record from which the jury can reasonably conclude that the minds of Scherm and Steinberg met with the minds of the other co-conspirators on an express understanding that they were to keep this thing secret from the outside.

The Court: And from all investigatory bodies in the future.

Mr. MacMahon: Yes.

* * * * * * *

COURT'S RULINGS ON MOTIONS

The Court: While we are all here, I shall announce my decision upon the motions.

I appreciate the very fine assistance that all counsel gave in connection with the motions which were made and argued before me Thursday afternoon throughout the entire afternoon. I spent Friday reviewing the record and considering the briefs which were submitted by Government and defense counsel. My decision on the motions is as follows:

With respect to the motions directed to counts 1 and 2 of the indictment, the motions are denied.

With reference to count 3 of the indictment, the motion to dismiss this count and grant judgment of acquittal with reference to this count is granted on the basis that that count alleges a single substantive offense which is outlawed by the statute of limitations as amended by the Act of Congress, which became effective on August 16, 1954.

Count 4 was dismissed before trial.

With reference to counts 5, 6 and 7, the motions to dismiss these counts as against the defendants Grunewald, Bolich, Steinberg and Scherm are granted.

The motions with reference thereto with respect to the defendant Halperin are denied.

All other motions to strike any testimony are denied.

All counsel have exceptions.

* * * * * * *

[fol. 584] HARRY T. SCHERM, Defendant.

Direct examination.

By Mr. Gottesman:

Q. Now, was Pattullo Modes among this batch of cases which you got?

A. Yes, sir.

Q. When was it approximately that you got this batch which included Pattullo Modes?

A. It was on or about, as I said before, January 7, 1947. The reason I remember that January 7th, it happens to be my birthday also.

Q. What did you do thereafter?

A. Well, we sign a card, you know acknowledging that—that is a receipt for the returns, and I returned that to the group chief. Then I started making appointments, to get on a telephone and call the various taxpayers and tell them that their return has been assigned for examination.

Q. And in the normal cause did you call the taxpayer with reference to the Pattullo Modes?

A. Yes, sir.

Q. Did you call Pattullo Modes?

A. Yes, sir. I called the office of Pattullo Modes.

Q. And what were you told?

A. I was told to contact the taxpayers' representative, Mr. Maurice Smith, whose signature appeared on the return.

Q. He had signed the return?

A. Yes, sir.

Q. Did you accordingly contact Mr. Smith?

A. Yes, sir.

Q. What did you say to Mr. Smith and what did he say to you?

A. Well, I told him I had been assigned the case of Pattullo Modes, and I would like to make an appointment to conduct an examination.

Q. Did you make an appointment?

A. Yes, sir.

Q. And where was that appointment to be held?

A. At the office of Pattullo Modes.

Q. Did you subsequently go, on the basis of that appointment, to the office of Pattullo Modes?

A. Yes, sir.

Q. Approximately when was this?

A. Early February of 1947.

[fol. 585] Q. Was Mr. Smith there?

A. Yes, sir.

Q. Did you make your examination?

A. Yes, sir.

Q. And what did you do as a result of that examination?

A. I made a disallowance of traveling and entertaining expenses and offset it with the proper accrual for New York State franchise taxes.

Q. Was that concurred in by the taxpayer?

A. Yes, sir.

Q. When you go to visit a taxpayer, what is the policy of the revenue agent in making an examination of the taxpayer? What is his purpose?

A. Well, we tried to make the examination as reasonable as possible and not irritate or provoke either representative or the taxpayer. In fact, that is part of our performance ratings, that we get along with the representatives and the taxpayer, and we also attempt to get a disallowance which is reasonable, so that we may obtain a form 870 and the case is agreed to at that time. It is not binding, but it is agreed to.

Q. What is an 870?

A. An 870 is an agreement signed by the taxpayer stating that he is in agreement with the tax deficiency recommended by the examining officer.

Q. Is that binding on the Government?

A. It is not binding on the Government, and the advantage to the taxpayer is that interest stops, I believe it is 90 days after the signing of the 870.

Q. Thereafter, did you return to your office?

A. Yes, sir.

Q. Was that 870 signed, the initial 870?

A. Yes, sir, the 870 was signed by one of the stockholders.

Mr. MacMahon: Could we have the time fixed?

Q. When was this approximately?

A. Well, it was a few days—February 10th, February 12th, 13th.

Q. Somewhere in the middle of February 1947?

A. Yes, I would say sometime in the middle of February, 1947.

Q. Thereafter, did you return to your office?

A. Yes, sir, I returned to my office.

[fol. 586] Q. And what happened after that?

A. Well, in writing up the report referring to my work-sheets, I felt that I had been too lenient with the taxpayer in my disallowance of traveling and entertaining. I called Mr. Smith and so advised him. I then made a new computation, arrived at the new tax deficiency, gave the new agreement to Mr. Smith and destroyed the old one in his presence.

Q. Is that the usual procedure?

A. Oh, yes, sir.

Q. Why is the first one destroyed when the second is signed, Mr. Scherm?

A. Well, it may lead to confusion if you had two, one which was correct and one which was incorrect. Two may be processed. It is possible that the wrong one may be processed.

Q. And is that the custom of the Department, to tear up the first one when the second one is signed?

A. Either that or give it to the taxpayer's representative.

Mr. MacMahon: Your Honor, could we fix the time of this second 870?

Q. What was the interval between the two?

A. It was not more than four or five days. May I say a week? A week.

Q. What was your physical condition at this time, Mr. Scherm?

A. I was in terrific pain and I wasn't well at all.

Q. Did you subsequently go to the hospital?

A. Yes, sir.

Q. Were you subsequently operated on?

A. Yes, sir.

Q. Were you on leave from the Department?

A. Yes, sir, for a considerable length of time.

Q. On sick leave or annual leave?

A. Sick leave, sir.

Q. Mr. Scherm, you heard Mr. Smith testify, Mr. Marks testify, with reference to two dresses. Can you tell me exactly what occurred and approximately when with reference to those two dresses.

A. Yes, sir. When I called for the original form 870, Mr. Smith asked me if my wife would be interested in a few dresses.

[fol. 587] Q. What did you state to him?

A. I said to him, "They are a little too rich for my blood from what I have observed."

Q. What did Mr. Smith say?

A. He said, "Well, it is off season, and I am sure that Mr. Marks would give you the same break he gives everyone else on his close-out dresses, and the price won't be too out of line for you."

Q. Thereafter, did you send your wife up to Pattullo Modes?

A. Yes, sir.

Q. Do you know who waited on her when she was there?

A. When she entered, Mr. Marks greeted her and met her, and later a girl waited on her.

Q. Did she purchase two dresses?

A. Yes, sir.

Q. Did she pay for them?

A. Yes, sir.

Q. What did she pay for them?

A. Either $40 or $50.

Q. Mr. Scherm, you came out of the hospital approximately when?

A. I don't know the date I came out of the hospital, but I reported for duty on April 30th.

The Court: We are still talking about 1947?

Mr. Gottesman: Yes, sir, 1947.

Q. When you returned to your office on April 30, 1947, what did you find with reference to Pattullo Modes?

A. My group chief, after greeting me, called me to his desk and he gave me an information form on Pattullo Modes. It had two cover letters on it.

Q. Is this what you found? I show you Defendants' Exhibit B (handing). Or rather, is that what you were given?

A. Yes, sir, this is the letter and the information form.

Q. That was April 30th, was it not?

A. Yes, sir, the day I returned for duty.

The Court: That was the report that came with the report of the examination of Loehmann's and was transmitted to the New York office?

Mr. Gottesman: Yes, sir.

[fol. 588] Q. And this was an information return?

A. Yes, sir.

Q. And what did it contain?

Mr. MacMahon: Your Honor, I submit it speaks for itself.

The Court: If you want to identify it more, you can, but this is the information return, I think we had agreed, that was sent as a result of the examination of Loehmann's, indicating there had been certain sales made which had not been reported apparently, that had not gone through the books of Pattullo Modes so far as they could see.

Is that about right?

The Witness: Yes, sir, that was it in substance.

Q. What was the amount of sales as indicated on this form?

A. Approximately $30,000.

Q. Upon receipt of this information form, what did you do?

A. I immediately contacted the taxpayer's representative, Mr. Maurice Smith.

Q. What did you say to Mr. Smith and what did he say to you?

A. I said to Mr. Smith that I have additional information which appears to necessitate a re-examination of the books and records of Pattullo Modes, and made an appointment for May 2nd at the office of Mr. Smith.

Q. What did you do thereafter?

A. I took the figures on the information form down on a second sheet of paper, a piece of white scratch paper, and I kept the appointment with Mr. Smith at his office.

Q. What did you say to Mr. Smith at that time and what did he say to you?

A. I said to him that I have an information form. I may have called it a form 917—the terms are interchangeably used—and that it appears to evidence the fact that there was some undisclosed income, undisclosed sales, I may have used, on the books of Pattullo Modes. He said that given a few days, he would like to discuss the matter with his clients. I said that would be agreeable to me, and we [fol. 589] made an appointment for May 6th to be at the office of Pattullo Modes.

Q. On May 6th, did you go to the office of Pattullo Modes?

A. Yes, sir.

Q. Were you given the books and records that you requested?

A. Yes, sir.

Q. Did you make an examination?

A. In so far as the Form 917 or information return was concerned, I did.

Q. And what did you find?

A. I found that the sales disclosed on the information form had not been properly reported on the income tax return or on the books of Pattullo Modes.

Q. What did you then do or say?

A. I immediately closed the records and told Mr. Smith that there was nothing further I could do, and he asked me, "What is the procedure from now on?"

Q. What did you say to him?

A. I told him I had to report the matter to my group chief, and this gives every evidence that there will be a very intensive examination made of his books and records.

Q. Did Mr. Smith at that time make any request or make any suggestion?

A. Yes, sir. He says, "Please give me a few more days. I would like to discuss this matter further with my clients. You are right; there are undisclosed sales on the books and records of Pattullo, and if you will give me a few more days, I will have additional information in addition to these sales.

Q. Did Mr. Smith say he was aware or unaware of these sales?

A. Well, at this meeting he was aware of them, he had been advised, but up until he had spoken to the taxpayer after my April 30th visit, he said he knew nothing of any irregularities on the books of Pattullo.

Q. Thereafter, did you see Mr. Smith again, or did he communicate with you?

A. I saw him two days later, and he gave me schedules reflecting not only the $30,000 as shown on that form 917, but a total of over $300,000 of undisclosed income on the books and records of Pattullo that had not been reported on their return.

[fol. 590] Q. What did you then do, Mr. Scherm?

A. Well, I did as I had before. On the original May 6th meeting, I told my group chief that I had what appeared to be a fraud case, and after the May 6th meeting, I asked my group chief whether it would be all right to postpone requesting a special agent until May 8th because the taxpayer's representative had promised to give me considerable more information. When I did receive this information on May 8th from Mr. Smith, I immediately gave it to my group chief, attached to a request that I made for a special agent in the case.

The Court: Who was the group chief?

The Witness: Mr. Max Steinberg.

Q. Did you at that time give him the file and all the papers attendant to the case?

A. Yes, sir, the complete file with my request.

Q. What was that request in the form of, a memorandum, formal or informal or how was it?

A. It is an informal pencil memorandum in which we tabulate or list the types of income that we have discovered and the reasons, giving that as the reason for requesting the cooperation of a special agent in the case.

Q. You included therein this information which Mr. Smith had given you?

A. Yes, sir.

Q. What did Mr. Steinberg say then?

A. He said, "I will take care of the matter" or words to that effect, and left his desk to present it to the proper

authority, who was Mr. Reagan, at that time the assistant agent in charge, who was in charge of the Fraud Section and the Cash Purchase Section.

Q. Had you ever had a fraud case prior to that?

A. No, sir, this was my first fraud case. In fact, it is the only fraud case in my entire career with the Government as an examining officer.

Q. This is the first and only fraud case you ever had?

A. Yes, sir.

[fol. 591] Q. During this time you had other cases, did you not, on which you were working?

A. Oh, yes, sir; I was going along with my routine assignments. I have to keep up my production record. That is what our entire promotion and efficiency ratings are based on. That is a big factor. That is not the only factor. It is a big factor.

Q. After you had handed this Pattullo file over to Mr. Steinberg, did you continue doing your regular, normal work?

A. Yes, sir. I maintained my good production record.

Q. When was the next time you had occasion to mention Pattullo Modes or discuss Pattullo Modes?

A. I discussed it with my group chief at the end of May, May 31st.

Q. What was the reason for that discussion?

A. The reason I discussed it is that—I will have to explain the regular office routine to you. We have monthly closings. Each month we submit a production report. The production report has on it all the cases, the tax deficiency or over-assessments for that period, and it also carries a part for inventory we have on hand; and we also submit with it a work-in-process schedule to account for the time that is spent on work in process.

At that time the Pattullo Modes—after all, it was in my inventory and I was accountable for it—and at that time I asked Mr. Steinberg, my group chief, "What is the status of my request for a special agent?"

Q. What did Mr. Steinberg say to you at that time?

A. He said, "I will speak to Mr. Reagan about it."

Q. Thereafter, did Mr. Steinberg talk to you about it again?

A. Well, he later reported to me that Mr. Reagan said the matter was still on his desk.

Q. Then did you continue on your normal routine business?

A. Yes, sir.

Q. When was the next occasion that you had to speak to anyone with reference to Pattullo Modes?

A. On the June 30th closing.

[fol. 592] Q. And did the same thing happen once again?

A. Yes, sir.

The Court: What did Mr. Steinberg say at that time about it?

The Witness: He again reported to me that he had spoken to Mr. Reagan and that the matter was still with Mr. Reagan.

Q. What was the next time that you had occasion to speak to anyone with reference to Patullo Modes?

A. Sometime in the latter part of August or the beginning of September, my group chief told me to report, that he had just received a telephone call from Mr. Wheeler, the Internal Revenue Agent in charge, and I should see him in his office.

Q. And did you go to see Mr. Wheeler?

A. I did, sir.

Q. What did Mr. Wheeler say to you and what did you say to him?

A. Mr. Wheeler asked me the facts in the Pattullo Modes case, and I told him as I knew them to date.

Q. What did you say to him?

A. Well, I told him about the original examination, that I had received a Form 917; I had contacted the taxpayer's representative; he had given me not only the information on the original Form 917, but additional information aggregating over $300,000 of undisclosed income; that he had denied any knowledge that these irregularities had appeared on the books of Pattullo Modes; and that I had returned that information to my group chief, and my group chief had passed the request for a special agent to Mr. Reagan.

Q. Did you tell Mr. Wheeler you had requested a special agent?

A. Oh, yes, sir.

Q. Did you then continue with your normal work once again?

A. Yes, sir.

Q. During this entire period of time, were you carrying other cases?

A. Oh, yes, sir.

Q. How many cases were you carrying during this period of time?

A. As I say, my normal inventory was at least 40 or 50 [fol. 593] cases. During that period from May to August or September, I must have closed out at least 40 or 50 cases with over $100,000 of deficiencies.

Q. When was the next time you had occasion to discuss Pattullo Modes?

A. It strikes me that was a few months later. It could be the latter part of October or the latter part of November. I was again informed by my group chief that Mr. Wheeler wanted to see me.

Q. Did you then go to see Mr. Wheeler?

A. I did, sir.

Q. What did Mr. Wheeler say to you and what did you say to him?

A. Mr. Wheeler said to me, "Scherm, what do you know about an informal"——

Mr. MacMahon: Your Honor, this is hearsay I submit. I object to it on that ground.

The Court: I will allow the witness to say what Mr. Wheeler asked him, and not what Mr. Wheeler told him. You are not going to give evidence that Mr. Wheeler told him——

Mr. MacMahon: I submit Mr. Wheeler is a dead man here and without any opportunity to put him on the witness stand to deny anything that this witness may say he said, and I think under those circumstances the hearsay rule is designed to guard against that very specifically.

The Court: We certainly don't want hearsay evidence of that type.

Mr. Gottesman, I presume what you are trying to bring out is what your client said to Mr. Wheeler in response to Mr. Wheeler's statement.

I don't want to bar you from anything that is proper in the case, but can you do it this way—he had the discussion with Mr. Wheeler; what did he say to Mr. Wheeler.

Mr. Gottesman: All right, your Honor.

Q. What did you say to Mr. Wheeler after he had interrogated you?

A. I said there was no voluntary disclosure in the case. [fol. 594] The Court: Your discussion with him was concerning the question as to whether there was a voluntary disclosure?

The Witness: Yes, sir.

The Court: And he asked you that?

The Witness: Yes, sir.

The Court: All right, now, go on, Mr. Gottesman.

Q. At that time, did he ask you to make a memorandum? Did you prepare a memorandum at that time for Mr. Wheeler?

A. Yes, sir.

Q. Did you set these facts forth in the memorandum?

A. The entire history of the case up to date.

Q. Did you give that to Mr. Wheeler's secretary?

A. I gave that to Mr. Wheeler personally.

Q. Did you then return to your normal work?

A. Yes, sir.

Q. Did you make any further inquiries with reference to the Pattullo Modes case?

A. No, sir, I felt that the Internal Revenue agent in charge was now on notice. I didn't feel that I should make any further inquiries of anyone else.

Q. What was Mr. Wheeler's position at that time?

A. The Internal Revenue agent in charge. He is in charge of the entire office.

Q. Was that the same position he held at the time of your first meeting in August or September?

A. Yes, sir.

The Court: That is what has been called the Ninth Avenue office?

The Witness: Yes, sir, also known as the Third District, New York.

The Court: He didn't have charge over the Intelligence Unit.

The Witness: No, sir, this is known as the routine examination, Internal Revenue agent's office.

[fol. 595] Q. What was the next time that you had occasion to have anything to do with Pattullo Modes again?

A. The early part of February, 1948.

Q. What occurred?

A. My group chief gave me a letter addressed to the Intelligence Unit requesting the cooperation of a special agent in the examination.

The Court: And the group chief at that time was the same man, Mr. Steinberg?

The Witness: Yes, sir, Mr. Steinberg.

Q. I show you this Exhibit 50, which is a letter signed by Mr. Wheeler, and ask you if that is the letter which you were given in February, 1948, just the letter without the slip (handing).

A. This is the letter, yes, sir.

Q. Do you remember whether you got that letter on February 3rd or a little later?

A. No, sir, I don't.

The Court: Mr. Gottesman, we have had so many exhibits and we want to keep them straight for the jury. What is the date of that?

Mr. Gottesman: This is a letter dated February 3, 1948, addressed to Mr. Bolich, signed by Mr. Wheeler, Mr. Bolich at that time being special agent in charge, requesting the appointment of a special agent.

The Court: That is the one Mr. Clayton identified as having been referred to him by the special agent's office?

Mr. Gottesman: Yes, sir.

The Court: This is just so that we keep the documents in some kind of order in memory.

Q. Then, Mr. Scherm, when you received that letter, what did you do?

A. I went to the office of the Intelligence Unit at 253 Broadway.

Q. Did any time elapse?

A. Between the time I received the letter and went to 253 Broadway? There may have been some time. We don't [fol. 596] drop everything and rush immediately down.

Q. Was it a day or two or a week or what was it?

A. It wouldn't be more than three or four days, until I had my other work properly taken care of.

Q. Did you then go down to 253 Broadway with this letter?

A. Yes, sir.

Q. And that is the office of whom?

A. The Intelligence Unit.

Q. Did you present this letter at that time to whom?

A. To the receptionist.

Q. What occurred?

A. She sent me to Group Chief Dowling.

Q. Was that the gentleman who testified on the stand here?

A. Yes, sir.

Q. Was that the gentleman who afterward became the chief investigator for the King Committee?

A. Yes, sir.

Q. What did Mr. Dowling say to you at that time?

A. He assigned me to Special Agent Vincent Clayton.

Q. Did you then take that letter to Mr. Clayton?

A. Yes, sir.

Q. What did Mr. Clayton say to you and what did you say to him?

A. Well, I disclosed the file to him.

Q. Did you have the file with you?

A. Yes, sir.

Q. Go ahead, Mr. Scherm.

A. I showed him that the undisclosed income at this stage was in excess of $300,000 and discussed what had happened up to date in the matter.

Q. What did Mr. Clayton then say?

A. Words to the effect that I shouldn't do anything further until I hear from him.

Q. Is that the normal procedure?

A. Yes, sir, the special agent takes over in the fraud case.

Q. What did you then do?

A. I returned to my office.

Q. Did you continue with your normal work?

A. Yes, sir.

Q. With your usual routine duties?

A. Yes, sir.

[fol. 597] Q. What occurred thereafter, Mr. Scherm?

A. Some time in August, it strikes me it was the early part of August, I received a phone call from Mr. Clayton asking me—we made an appointment to meet outside the building in which the office of Pattullo Modes was.

Q. When was this?

A. I believe this was August.

The Court: 1948.

The Witness: August 1948.

Q. Prior to meeting Mr. Clayton outside of the office did you see him before that between February 1948 and this date?

A. Well, I saw him in his office, sir, when I disclosed the additional income to him and discussed the matter with him.

Q. Was there ever an occasion when Mr. Clayton asked you to draw an affidavit?

A. Oh, yes, sir, but that affidavit came at a later date, sir. That came at a later date.

The Court: What Mr. Gottesman was interested in is did you see Mr. Clayton between this time when you disclosed it in February and the time when you met outside of the Pattullo Modes building in August? Did you see Mr. Clayton in that interval? That is what Mr. Gottesman wants to know.

The Witness: I may have seen him on one or two occasions and asked him a few more questions about the case, but nothing of any——

By Mr. Gottesman:

Q. Did you ever have occasion to see Mr. Baradel?

A. Oh, yes, sir.

Q. When did you see Mr. Baradel for the first time?

A. I received a phone call the early part of August, sir, yes, sir.

Q. Was it August or was it later?

A. Oh, I didn't meet Mr. Clayton until November to start [fol. 598] the examination; that is true, sir. It was November, not August. I don't know why I am choosing August. It was November I received the phone call to see Mr. Bara-

del. There was a message for me, and I returned Mr. Baradel's call, the way I understand, and he made an appointment for me to see him at his office.

Q. Who was present when you came to the office?

The Court: When was that?

Q. When was that?

The Court: That appointment?

A. Early November; not August. I don't know why August was sticking in my mind.

Mr. MacMahon: What year, your Honor?

The Witness: 1948.

Q. When you met Mr. Baradel who else was there?

A. I believe Mr. Clayton and Mr. Dowling originally. We had a conference.

Q. What did you discuss at that time?

A. The possibility of a voluntary disclosure in this case.

Q. What did you state at that time?

A. I stated emphatically that there was no voluntary disclosure in this case.

Q. What did Mr. Baradel then do?

A. He called in Mr. Smith, and I believe it was Mr. Saver, and the conference continued.

Q. What was discussed at that continued conference between Mr. Clayton, yourself, Mr. Smith and Mr. Saver?

A. Well, it appears that Mr. Smith had made a claim that he had either made a voluntary disclosure to me at the time he handed me the original Form 870, or through a telephone call he had made a voluntary disclosure and asked me to hold up my report for a few days until he investigated a few matters which were bothering him as to the propriety of the Form 870 he had given me, that it [fol. 599] wasn't properly disclosing the tax deficiencies due by the taxpayer.

Q. When did he allege this conversation took place?

A. As I say, either when he handed me the original Form 870, or by telephone at some later date, a day or two after he gave me Form 870.

Q. Prior to the 917?

A. Yes, that would have been prior to the Form 917.

Q. Did you agree or disagree with Smith?

A. Well, I had already disagreed. I told Mr. Baradel my position, and this was the first true indication I ever had that the claim of voluntary disclosure was being made by the taxpayer's representative.

Q. What did Mr. Baradel then say to the taxpayer, if you recollect? I will withdraw that. What did Mr. Baradel say?

A. I don't know whether he said anything in their presence, sir, but they left his office, and I believe Mr. Clayton and Mr. Dowling and myself were there.

Q. And what did Mr. Baradel say?

A. He said I think Mr. Smith is—he made very emphatic what type of liar he was.

Q. What did he say to Clayton and you?

A. "Proceed with your examination."

Q. Thereafter did Mr. Clayton contact you?

A. Yes, shortly thereafter.

Q. What did he say? Did he arrange for an appointment?

A. He told me to meet him outside the building of the Pattullo Modes office.

Q. Did you meet Mr. Clayton outside the Pattullo Modes office?

A. Yes, sir.

Q. And what did you both do?

A. We went to the office of Pattullo Modes.

Q. Whom did you speak to?

A. Well, Mr. Clayton did the talking and asked—he told what he was there for; he wanted the books and records, and I believe it was Mr. Morton Marks came out and led us to an office.

Q. Thereafter did anyone else appear?

A. The taxpayer's representative, Mr. Davis.

[fol. 600] Q. What occurred thereafter?

A. Mr. Davis spoke to us. He said, "Don't hesitate. We will cooperate in every respect. Your command is our wish," and so on in the production of the books and records for our examination.

Q. Did you and Clayton proceed to work on the books?

A. Yes, sir.

Q. Did anyone else assist you?

A. I don't know if at the original examination, the first

day, Mr. Recchia, the special agent was there, but he did join us in the examination at a later date.

Q. And how long did you continue on this examination?

A. All of November and practically all of December that we spent on the original examination of the books and records.

Q. During this period of time did the taxpayer present any documents or information to you?

A. Considerable data, sir.

Q. And what did Mr. Clayton and you do during this period of time?

A. We together verified this information that was given to us.

Q. Did you check the information?

A. Yes, sir.

Q. That was given to you?

A. Yes.

Q. Against what did you check it?

A. Against the books and records and what other substantiating evidence we needed.

Q. Did the taxpayers give you their Stock Exchange reports, statements?

A. Yes, sir.

Q. Did they give you any other statements?

A. Oh, net worth statements were submitted. I don't think they were submitted originally; I think they were submitted some time later in the examination.

Q. Did you check those net worth statements against all the information which was available?

A. Yes. We used it as corroboration of the undisclosed income, the total undisclosed income that we had found.

Q. Did you find the verification checked out very well?

A. The undisclosed income was far in excess of the net worth increases after taking into consideration all adjustments.

[fol. 601] Q. And was Mr. Clayton satisfied at that time?

A. He gave no evidence of being dissatisfied.

Q. The two of you worked jointly on this?

A. Yes, sir.

Q. Thereafter did you work on the question of allowances and disallowances?

A. Well, that was part of the general examination, sir.

Q. Did you and Mr. Clayton discuss that?

A. Yes, sir.

Q. Was Mr. Davis in on those discussions?

A. Yes, sir.

Q. Were you friendly or unfriendly with Mr. Davis during this examination?

A. I wasn't friendly, sir.

Q. What is the reason for this statement that you weren't friendly? What occurred?

A. Well, I guess I was as confirmed in my position as he was in his. I just thought he was overly argumentative on every issue that was presented to him.

Q. Did you make any change in your position if you felt you were justified?

A. Not if I felt I was justified, no, sir; not if I felt I was justified.

Q. Was Mr. Clayton present during these discussions?

A. Yes, sir.

Q. Did you discuss with Mr. Clayton the allowances and disallowances?

A. Yes, sir. We mutually discussed all these phases of the examination. In fact, may I add a thought here: In so far as the disallowance of travel and entertainment that I made, that was traced to the personal accounts, the bank accounts that have been used by the stockholders for the acquisition of personal assets or personal expenses, and that was discovered primarily by Mr. Clayton or Mr. Recchia; they were the ones that were attempting to trace the fraudulent items which would be reflected in the books and records of the individual stockholders.

Q. That was their function?

A. That is their function. That is an income item.

[fol. 602] Q. Was there any discussion at this time of accrued commissions?

A. Yes, sir. That was brought up during the course of the examination.

Q. What was your initial position on this?

A. I couldn't see the justification for it.

Q. Was any evidence then presented to you?

A. I don't know if it was presented at the office of Pattullo Modes, but at the time the question came up, either

at that time or shortly thereafter, considerable evidence was given to me to sustain the taxpayer's representative's position.

The Court: Are these accrued commissions to Jo Copeland? Is that what we are talking about?

The Witness: Yes, sir.

Mr. Gottesman: Yes, I will get right to it. If your Honor wants to take a break now——

The Court: I think we will take a ten minute recess now.

(Short recess.)

By Mr. Gottesman:

Q. Mr. Scherm, going back for just a moment, you prepared a memo for Mr. Wheeler at Mr. Wheeler's request?

A. An informal pencil memorandum.

Q. And you gave that to Mr. Wheeler?

A. Yes, sir.

Mr. Gottesman: May I ask the Government if they have that memo, please?

Mr. MacMahon: The Government has never seen such memorandum, your Honor.

Q. You also presented an informal memorandum requesting a special agent in May of 1947?

A. Yes, sir.

Q. And that was attached to the file?

A. Yes, sir.

Mr. Gottesman: May I ask the Government for that?

The Court: That was a pencil memo, too?

[fol. 603] The Witness: Yes, sir.

Mr. MacMahon: Exactly the same answer on that, your Honor. The Government has never seen such a memorandum.

The Court: All right. You have had a search made of the files?

Mr. MacMahon: We searched all the files very thoroughly, your Honor. We have them all in our possession. There are no such memos.

Mr. Gottesman: In your possession, Mr. MacMahon.

The Court: Yes.

Mr. MacMahon: We have found no such memos after a thorough search of all the files.

By Mr. Gottesman:

Q. Getting back for just a moment, Mr. Scherm, when was your last day that you actually worked prior to the commencement of this trial? Do you remember the last day you were employed?

A. The last day I was paid? The last day I was on the payroll, sir?

Q. That is right.

A. December 1954.

Q. And up to that time you were a group chief?

A. Yes.

Q. And paid as a group chief?

A. At that time I was a group chief, yes.

Q. Now, with reference to the accrued income and the Jo Copeland situation, Mr. Scherm, what was presented by the taxpayer's representative to you in that matter?

A. I received a copy of the contract between Jo Copeland and Pattullo Modes. I had an affidavit filed by the attorneys for Jo Copeland stating their claim. And at a later date I received a number of citations from Mr. Davis stating his position in the matter.

The Court: Mr. Gottesman, I think it might be a little clearer if we just got what the taxpayer was contending with reference to this issue that was [fol. 604] before the agent, what relevance this Jo Copeland matter has.

Q. What was the taxpayer's contention with reference to accrued income, Mr. Scherm?

A. The taxpayer was contending that a suit, an action was being brought against Pattullo Modes by Jo Copeland.

The Court: What bearing did that have on the tax liability?

The Witness: For additional compensation.

The Court: (Continuing) That you were then computing?

The Witness: It would reduce the tax deficiency I would find because any undisclosed income that I would find taxable to the corporation, her 50 per cent interest, or her

percentage interest would have to be deducted in computing the tax deficiency.

The Court: That is what the taxpayer was contending for and that is what those papers were submitted to you for in connection with that contention, is that right?

The Witness: Yes, sir.

Q. In other words, that would be a liability which the taxpayer claimed he could deduct before the computation of the tax?

A. Yes, sir.

Q. And in the examination of the taxpayer's return for the purpose of computing the tax, is it proper for deductions to be made for all liabilities of a taxpayer?

A. We don't speak of them as liabilities, sir, but as I understand your question, yes, sir.

The Court: Now, wait a minute.

The Witness: I mean I don't understand that.

The Court: You don't——

The Witness: You don't deduct liabilities.

The Court: You don't deduct liabilities in determining the taxable income.

[fol. 605] By Mr. Gottesman:

Q. You take off all the expenses?

A. Yes, sir.

Q. And this would be an expense?

A. Yes, sir.

The Court: That is what the taxpayer was contending, that this was accrued expense, is that right?

Q. Accrued expense?

A. Yes, sir.

Q. Because we have referred to it here as accrued income. In other words, it is usually an expense which the taxpayer claims should be deducted before you computed your tax?

A. Yes, sir.

Q. And he gave you documents to substantiate his contention?

Mr. MacMahon: Your Honor, I submit that is leading.

Mr. Gottesman: We have just gone over it.

The Court: I may have led into it, but I think we at least want to know what this controversy was about. Now, go on.

Q. What did the taxpayer give you to substantiate his contention?

A. As I previously stated, sir, a copy of the contract, employment contract of Jo Copeland with Pattullo Modes, an affidavit from the attorney—I think their name is Arent & Freidberg, stating the basis of their claim, and thirdly, citations, U. S. Supreme Court citations and other court decisions stressing their position or stating their position.

Q. Did you discuss these with Mr. Clayton?

A. Yes, sir. In fact——

Q. Did you show him these?

A. Yes, sir.

Q. What did the two of you do?

A. When I first received the citations I went down to his office and we went to his library and retraced the question.

Q. Did you both come to a conclusion? Was the taxpayer justified or unjustified?

A. Justified.

[fol. 606] Q. Did you make any inquiries of anyone else with reference to this particular problem?

A. Yes. I knew it involved a tremendous sum of money, but to be extra satisfied—I was satisfied myself—I discussed it with a few people whose opinions I respect in my office.

Q. Did they all concur with you with reference to this determination?

A. Yes, sir.

Q. During November and December when you were working jointly with Mr. Clayton was there virtual agreement on most of the allowances and disallowances?

Mr. MacMahon: Your Honor, I object to the question as leading.

The Court: Yes, objection sustained, and also it is objectionable as to form, because agreement doesn't disclose with whom, or what was agreed on.

Q. Did you and Mr. Clayton and Mr. Davis discuss any matters during November and December?

A. I discussed all matters with Mr. Clayton.

Q. Did you discuss travel and entertainment with Mr. Clayton?

A. Yes, sir.

Q. Did you discuss cash allowances——

Mr. MacMahon: I object to that question, your Honor, as leading. Let him state what he discussed.

The Court: I will allow it. I don't think there is any harm.

Go ahead. He said he did discuss it.

By Mr. Gottesman:

Q. Did you and Mr. Clayton agree as to travel and entertainment?

Mr. MacMahon: Your Honor, I object to the form of that one.

The Court: I will sustain the objection to the form of that. Let me suggest, Mr. Gottesman, another question:

[fol. 607] Did you reach any determination on the proper amount of deductions which should be allowed to the taxpayer?

The Witness: Yes, sir.

The Court: Did Mr. Clayton reach any conclusion?

The Witness: Yes, sir.

The Court: Was there any difference between the conclusions?

The Witness: He stated no difference to me, sir.

By Mr. Gottesman:

Q. Was Mr. Davis aware of these conclusions and determinations?

A. Oh, certainly.

Q. Was Mr. Davis advised of these in the presence of Mr. Clayton?

A. Yes, sir.

Q. Were you ever at Pattullo Modes in November or December without Mr. Clayton?

A. No, sir.

Q. How long did you work with Mr. Clayton at Pattullo Modes in 1948?

A. As I said, November and the greater part of December, if my memory serves me right.

Q. Thereafter what did you do?

A. I started computing and scheduling and started working on the report and reviewing our papers to determine whether or not we had arrived at a reasonable conclusion. For instance, in the case of the commissions and New York State franchise tax accruals, they demanded computations, extensive computations, and there was also a question of the distribution of surplus; in other words, income that could be traced to the stockholders, and this undisclosed income in turn was taxed to the individual stockholders; that demanded detailed computations. There was more work in computing the tax liability and ascertaining the propriety of the adjustments than there was in the original examination.

Q. During the course of these computations did you have occasion to meet with Mr. Clayton?

A. I would say—yes, on many occasions.

[fol. 608] Q. Did you show him your computations?

A. Well, in so far as the adjustments were concerned, I don't know whether I showed him the computation as to the actual computation of the tax liability which he wouldn't be interested in, the actual tax liability computation, but in so far as the adjustments were concerned, he knew what I was doing.

Q. And you discussed it with him?

A. Yes, sir. I was at his office on many occasions and he was at my office on many occasions during the preparation of the report and the determination of the tax deficiency.

Q. Now, at the beginning of 1949 did anything occur with reference to Pattullo Modes?

A. Yes, sir, there was—yes, sir.

Q. What occurred?

A. There was a conference again at the office of Mr. Baradel.

Q. When was it, you say? January, 1949?

A. January, 1949.

Q. How many conferences did you attend in January, 1949, at Mr. Baradel's office? One or more than one, if you recollect?

A. As I recall only one, sir.

Q. When was that?

A. I believe it was the 10th of January, 1949.

Q. Who was present at that conference?

A. Mr. Baradel, Mr. Davis, Mr. Clayton, Mr. Saver; I believe all the stockholders except Mrs. Bellet; that would be four stockholders, and myself. I believe that is all to the best of my memory.

Q. What was said at that conference and by whom?

A. Mr. Baradel informed the taxpayers that due to their cooperation and with the understanding that they would continue to cooperate, that the criminal prosecution was being waived.

Q. Did Mr. Baradel ask you and Mr. Clayton questions with reference to the cooperation of the taxpayer?

A. Yes, sir.

Q. To the best of your knowledge had the stockholders, had the Pattullo Modes cooperated with Mr. Clayton?

[fol. 609] A. Well, with me. There was no question in my mind; they had given me practically 80 or 90 per cent of the undisclosed income. That was proof of their cooperation, to me.

Q. Did Mr. Clayton state the same thing?

A. He answered affirmatively when he was asked.

Q. What else did Mr. Baradel say, if you recollect?

A. He admonished the taxpayers, stated that from now on they should be good, upright citizens, they were quite fortunate in having this prosecution waived, and that they should behave, as I say, as good citizens in the future.

Q. Did you have any reason to doubt the taxpayers, Pattullo Modes, as to their sincerity and cooperation?

A. Neither I nor the special agent doubted their reliability from that point on.

Mr. MacMahon: I move to strike the answer out as not responsive.

The Court: The answer is not responsive. The question was did you have any reason to doubt their sincerity.

Q. Did you have any reason?

A. No, sir.

Q. To your knowledge did Mr. Clayton have any reason to doubt?

A. No, sir.

The Court: Did he ever express any doubt to you thereafter as to their honesty?

Q. Did Mr. Clayton ever express any doubt?

A. No, sir.

The Court: He says no. All right.

The Witness: No, sir.

Q. Thereafter did you and Mr. Clayton continue working on the Pattullo Modes matter?

A. Yes, sir.

Q. Mr. Scherm, you submitted this report with the enclosures?

A. Yes, sir.

[fol. 610] Q. What is the procedure in your office when a report is submitted by a revenue agent?

A. This report, I assume?

Q. Yes, sir.

A. We had a fraud section at that time, and the report, before we took any production time or before we could consider it approved, was submitted to the fraud section. They in turn would review it, return it to the group chief, and it was returned to me to be put on the production report. Then through the production record, through the group chief I should say, it was sent to the control section and routed to the regular review section, who would again review it and pass upon it, either approve it or return it for corrections or errors they found.

Q. Was this report of yours approved?

A. By the routine review section, it was returned to me, if my memory serves me right, for certain minor adjustments. I think they were mathematical errors. In so far as the adjustments in the body of the report are concerned, there were no differences found.

Q. Was it reviewed by, as you say, the fraud section?

A. First it is reviewed by the fraud section, yes, sir.

Q. And did they approve it?

A. Yes, sir.

Q. Who was the gentleman in charge at that time, if you know?

A. The Assistant Internal Revenue Agent in charge, Mr. Reagan.

Q. Who was the reviewer?

A. Who reviewed it in the fraud section?

Q. Yes, who reviewed it in the fraud section, if you know?

A. As I recall, he had a few men reviewing. I don't recall who reviewed my report.

Q. Who was the regular reviewer?

A. The regular reviewer? Mr. Meyer Cohen.

Q. To your knowledge, did he approve it?

A. Yes, sir.

Q. After these mathematical corrections were made, I am referring to, it was approved?

A. Yes, sir.

* * * * * * *

Q. Thereafter, did you receive notification that there was a conference with reference to your report?

[fol. 611] Mr. MacMahon: Your Honor, I object to the question as leading.

The Court: I will allow that. That is a preliminary question.

Go ahead: You can answer that. Were you notified that there would be a conference with reference to your report?

The Witness: Yes, sir.

Q. When approximately was that conference held, what year?

A. 1950.

Q. Before whom was that conference held?

A. Mr. Fishkin, conferee.

Q. Who was present at that conference when you attended?

A. Two attorneys and Mr. Clayton. I don't recall the attorneys' names—oh, yes, I do, Sher and Roder, representatives Sher and Roder.

Q. At that time was anything done with reference to the tax?

A. No, sir.

Q. What occurred?

A. It was deferred until the future time.

Q. Were you ever called at any future time with reference to a conference?

A. No, sir.

Q. Did you ever attend a conference with reference to this matter?

A. At the first conference I just mentioned.

Q. Yes.

A. I never attended a conference after that.

Q. Were you subsequently apprised of the fact of what action had been taken by the conferee?

A. Yes, sir, I was.

Q. What was the action taken by the conferee?

A. My tax deficiency was reduced from approximately $240,000 to approximately $160,000.

Q. Did you ever have an occasion to discuss $40,000 with either Mr. Hoffman or Mr. Davis?

A. No, sir.

Q. Did you ever discuss $40,000 when Mr. Hoffman entered into such a conversation?

A. No, sir.

[fol. 612] Q. Was there ever such an occasion when you discussed with Mr. Hoffman receiving any moneys whatsoever?

A. No, sir.

Q. You heard Mr. Davis testify with reference to the occurrence?

A. Yes, sir.

Q. Did you ever have any discussion with Mr. Davis with reference to $40,000 or $50,000.

A. No, sir.

Q. Did you have any discussion as to any money whatever with Mr. Davis or Mr. Hoffman?

A. No, I did not.

Q. Did you ever receive any money from Mr. Davis or Mr. Hoffman?

A. I certainly did not.

Q. Did you ever receive any money for someone else from Mr. Davis or Mr. Hoffman?

A. I certainly did not.

Q. Mr. Scherm, when we spoke of the two dresses that your wife purchased, you used the expression "Too rich for my blood" or some such. What did you mean by that?

A. My wife is not in the custom of wearing expensive dresses, sir. We couldn't afford it.

Q. What is your mode of living, Mr. Scherm?

A. I live, I consider it, very frugally. I do no entertaining of any extent. We rarely go to any outside sources for entertainment. I don't think we have been to a moving picture for six years. I haven't taken a vacation for six years. I have a 1947 automobile.

Q. How many miles have you got on your 1947 automobile?

A. My wife isn't in the best of health. She is in a certain period now. I have 23,000 miles.

Mr. MacMahon: Your Honor, I move to strike that out.

The Court: The question was how many miles have you got on the car.

The Witness: 23,000 miles.

The Court: Since 1947?

The Witness: Yes, sir.

The Court: You bought it new in 1947?

The Witness: Yes, sir, I did that.

[fol. 613] Q. When you purchased your car, where did your funds come from?

A. It came from moneys primarily saved by my wife while I was in the service. It also included an opening balance in a savings account of my annual leave that was accrued to me when I left for the service. That amounted to about three or four hundred dollars I believe. I am reciting from memory now. My wife saved approximately $900, and then I was discharged from the service, and my pay that was due to me when I was discharged from the Navy was about $300, which made up a total of about $1600 or $1700.

Q. Mr. Scherm, did you buy your own home?

A. Yes, sir.

Q. When did you buy it?

A. In 1950.

Q. Did you buy it under the GI bill?

A. Yes, sir.
Q. What did you pay for the home?
A. $14,075.
Q. How much did you pay in as a deposit?
A. My own money, $1,000.
Q. What other funds did you use?
A. I borrowed $3,000 from my dad.
Q. And was that by cash or check?
A. That was by check.
Q. From what account?
A. That was from his own account.

* * * * * * *

Q. Mr. Scherm, do you know Mr. Grunewald?
A. No, sir. I met him for the first time when we—just before we entered the courtroom the opening day.
Q. Do you know Mr. Bolich?
A. Mr. Bolich was my superior for about three months and I remember passing him in the hallway once. I never spoke to Mr. Bolich.
Q. Do you know Mr. Halperin?
A. I saw Mr. Halperin for the first time the day we were indicted in this building.
Q. Did you know Mr. Steinberg?
A. He was my group chief.
Q. Did you ever go out socially with Mr. Steinberg?
A. No, sir.
[fol. 614] Q. Did you ever visit his home?
A. No, sir.
Q. Did he ever visit your home?
A. No, sir.
Q. Did you ever go to any social functions with Mr. Steinberg?
A. Office social functions, sir?
Q. Did you go to office social functions with him?
A. You see, when there is an office social function a table is allotted to a squad. Mr. Steinberg would have a table and other group chiefs would have a table, and the men in his squad naturally would be assigned to that table on many occasions.

Q. Those were the only social functions you attended with him?

A. I had luncheon with him a few times with a group in our squad. We had luncheon.

Q. Mr. Schiern, did you ever conspire, combine, confederate and agree with others to defraud the United States in the exercise of its governmental functions in the administering of the internal revenue laws?

Mr. MacMahon: Your Honor, I object to the question. It calls for a conclusion.

The Court: That calls for a conclusion on which the jury will have to pass. You ask him the facts. That is a legal conclusion. Ask him whether he ever entered into a conspiracy with any of these people or a combination with them.

Q. Did you ever enter into a conspiracy with anyone to individuals?

A. No, sir.

Q. Did you ever—into a conspiracy with anyone to defraud the United States Government?

A. No, sir.

Q. Did you ever recommend or send any business to Schopick & Davis?

A. No, sir.

Q. Did you ever attempt to impede or talk to any witness not to testify in any case?

A. No, sir.

Q. Did you ever tell anyone not to testify in this case or any investigation with reference to this case?

A. No, sir.

[fol. 615] Q. Have you read the indictment in this case?

A. Yes, sir, I have read it.

Q. Did you do any of the facts alleged in that indictment?

A. No, sir.

Q. Did you ever receive $40,000 from Mr. Davis or Mr. Hoffman?

A. No, sir.

Q. Did you ever receive any money from Mr. Davis or Mr. Hoffman?

A. No, sir.

Q. Did you ever discuss with them the receiving of any money?

A. No, sir.

Q. Did you ever discuss receiving money from them in someone else's behalf?

A. No, sir.

Q. Did you ever have anything to do with Mr. Davis or Mr. Hoffman that was improper with reference to the tax return of Pattullo Modes?

A. No, sir.

MAX HALPERIN, one of the defendants, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Singer:

Q. Mr. Halperin, try to make me hear you and we will be all right. How old are you?

A. I was 70 on March 9th, last week.

Q. You celebrated your seventieth birthday on trial in this case. Is that so?

A. Unfortunately, yes.

Q. Where were you born?

A. I was born in Manhattan, New York City, down on the Lower East Side.

Q. Are you married?

A. I am, sir.

Q. What is your wife's name?

A. Rose S. Halperin.

Q. Do you have any children?

A. I have two sons.

Q. What are the names of your children and their ages?

A. Jerome S. Halperin, who is 41, and Bertram C. Halperin, who is 36.

[fol. 616] Q. Are both your children married?

A. They are both married, yes, sir.

Q. You attended school in the City of New York?

A. I did.

Q. Then did you go to high school?

A. For a while.

Q. For about how long?

A. Well, I really think it was about two years.

Q. Then what did you do after that?

A. I had to go out and get a position to help contribute towards the support of my family, and I went to the New York Prep School to prepare for law school.

Q. While you went to New York Preparatory School you took your Regents examination?

A. That is correct, yes.

Q. And while you were doing that and studying, did you work for any firm?

A. Well I worked temporarily for a woolen house. That took a very short time—I mean for a short time—and then I got a position in a law office. I think the firm was Abrams & Lasky. Mr. Abrams later became a judge.

Then I was employed by the law firm of Hymes, Woytisek & Schaap in the Pulitzer Building, in the World Building.

Q. Did you go to law school during this time?

A. Oh, yes.

Q. What school?

A. New York University Law School.

Q. And while you were working?

A. Well, for a while I took an afternoon course and then changed it; while I was working most of the time, yes.

Q. Did you take the Bar examination? When did you pass the Bar examination?

A. Well, I passed the Bar in October, well, it must have been the early part of 1910. I was sworn in October 24, 1910. This is my 45th year as a practicing attorney.

[fol. 617] Q. When you passed the Bar and were sworn in, you were still working for Hymes, Woytisek & Schaap?

A. Hymes, Woytisek & Schaap for a few years, yes, sir.

Q. It was about that time you got married, too?

A. I was married in 1910, yes.

Q. After that, after 1910—and I will lead you on this preliminary matter—did you share offices with one of your former employers, a Mr. Lasky?

A. Yes, I did.

Q. At 170 Broadway?

A. I did, yes, sir.

Q. Then after a while did you form a partnership with Sidney Rosenthal and have your offices around Times Square?

A. Alexander Sidney Rosenthal. I was in partnership with him until I believe 1921, and the partnership lasted about three years.

Q. Do you remember becoming a partner with Senator Sidney H. Towne?

A. No, I became a partner of Senator Charles A. Towne, an ex-United States Senator from the West, who came to New York and I think was elected to the House of Representatives.

Q. Mr. Towne died some time in the campaign of 1928?

A. Yes, he was campaigning for Alfred E.——

Q. I don't care about that.

A. Oh, he died in 1928, while he was on a campaign tour, yes, sir.

Q. Then you had your office at 17 East 42nd Street in the National City Bank Building?

A. Well, I had my office there and also after that at 100 East 42nd Street.

Q. In 1930, did you move to 531 Fifth Avenue?

A. 551 Fifth Avenue.

Q. Excuse me, 551 Fifth Avenue.

A. Well, I think it was a little after 1930, Mr. Singer. I was at 521 Fifth Avenue from 1929 I think until about 1934. Then I moved to 551 Fifth Avenue.

Q. Now, then, some time later, around 1939—and here I won't lead you any more—did you see an ad in the Law Journal?

A. Well, in 1939 I maintained an office at 551 Fifth Avenue and I had no tenants. I had a secretary, who was

[fol. 618] with me for 20 years and she was about to get married, so I wanted to reduce my expenses, and I inserted an ad in the New York Law Journal, and I also answered ads, and I came across an ad that attracted my attention, and I got in communication with the person who inserted the ad. That person was Mr. Irving Davis.

Q. What occurred? Did you and Mr. Davis open an office together on a particular basis?

A. Well, Mr. Davis and myself went over to 535 Fifth Avenue, and we rented a suite—that is, it was one room and they made three rooms out of it with a room for our files—and before we moved in, we inserted an ad for another tenant, and we got Mr. Allan Hyman. Mr. Davis occupied one of the rooms and I occupied one of the rooms. They were of equal size. We went in on a cooperative basis.

Mr. Singer: May I have Exhibit 38 for identification?

Q. I show you Government's Exhibit 38 for identification. Do you recognize that exhibit (handing)?

A. Yes, that was the lease between the City Bank Farmers Trust Company and Irving Davis and Max Halperin.

Q. Can you tell from that lease, can you remember, when it was that you first opened this office with Mr. Davis?

A. This lease is dated April 27, 1945, and I think that is just about the time—oh, no, we got in there before that. This must have been another lease.

Q. You mean there were leases drawn as you continued your arrangements?

A. Our first lease was in 1939, I am quite certain of that.

Q. Now, in 1945, what was the arrangement between you and Mr. Davis with respect to your office?

A. We shared the expenses on a cooperative basis. We paid the rent on a fifty-fifty basis. We paid the secretary on a fifty-fifty basis and the switchboard and all other [fol. 619] incidental expenses, except that the rent that Hyman would pay us would be deducted from the top. So that our expenses would run around $150 to $175 a month, more or less.

Q. Each?

A. Each, Davis' expense and mine.

Q. Where are you now?

A. My office now is at 55 Liberty Street. I have an office with Alger, Andrews & Rohlfs.

Q. You rent an office there?

A. I rent an office.

Q. You have no association with that firm?

A. No, I have no association with that firm.

Q. You practice for yourself?

A. That is correct.

Q. When did you leave 535 Fifth Avenue?

A. I think it was about the summer of 1953.

Q. Was there ever a time when you and Mr. Davis had a partnership, whether it was actual or——

A. Well, it was really a name. We had the names on the door, Halperin & Davis, and we had stationery, Halperin & Davis, and there were matters that we handled together where we would share the fees.

Q. When was this?

A. Well, that must have been before Schopick & Hoffman came in or Sherman. It must have been before 1945, probably 1943.

. . . . . .

Q. Before luncheon recess, we were at about the time when you said some other people came into the office. Do you remember when that was?

A. That was about 1945. Mr. Davis came into my room and he said to me that he had an opportunity to form a law partnership with two men that were then employed in the legal division of the OPA, and that he wanted me to have lunch with them and give him my opinion of what I thought of these two lawyers. They were about his age.

I said, "Irving, I would be very glad to meet them," and we met, and they had my approval.

But I said, "There is one obstacle here. Where are we going to put these men? We only have three rooms." [fol. 620] He says, "Don't worry about that. That is a temporary arrangement. We'll go out and get a larger suite of offices and we will consider you and Allan Hyman in any plans that we might have."

The partnership was formed with Sherman & Schopick.

Q. Did you have any interest, financial or otherwise, in that partnership?

A. None whatever.

Q. You continued to pay your portion of the expenses of the office?

A. I continued to pay it for quite a while until Mr. Schopick himself came over to me——

Q. You mean you continued to pay one-half?

A. I continued to pay one-half of the operating expenses until Mr. Schopick came over one day and he said, "I think that it is outrageous that you are paying that kind of money. You haven't got a room; you are thrown around here; you practically sit outside most of the day, and I think you ought to have access to this office and the use of it without paying anything."

"Well," I said, "I wouldn't want to do that, I would want to pay something"; and they made an arrangement to cut my expenses down to $40 a month, which included the use of the secretary when I had occasion to use her, plus telephone calls, plus incidentals like towel service and other things.

Q. Did you continue to pay that $40 a month?

A. I continued to pay that $40.

Q. Until when?

A. They never got new offices. They said the rents were too high, and they remained there.

Q. How long did you continue to pay the $40 a month?

A. I think until I moved, until we broke our offices up in 1953.

Q. Let us go back to the year of 1947. When did you say you first heard the word or the name Pattullo mentioned?

A. Well, to the best of my recollection, it was the latter part of 1947, or it could be the beginning of 1948. I can't remember dates. It is six or seven years old, but that is the first time that I heard of the Pattullo case.

[fol. 621] Q. When you first heard of it, had you already met Mr. Marks or Mrs. Segel?

A. Well, not formally. I used to see them come into the office. I never spoke to them.

Q. Can you tell me who it was who first mentioned Pattullo to you?

A. It was Mr. Davis.

Q. Do you remember the incident?

A. I do, yes.

Q. And you say it was in the latter part of 1947 or the early part of 1948?

A. To the best of my recollection, it was either the latter part, December, or the beginning of 1948. It might have been January or February. I don't remember.

Q. Where did this incident take place?

A. The incident took place in my room. I mean one of the rooms I occupied occasionally.

Q. Would you tell us what you said and what Mr. Davis said at that time?

A. Well, Mr. Davis came into my room and he said, "Max, I had a very peculiar circumstance or incident happen." He stated to me that he had met a lawyer by the name of Moses Polakoff, that he wanted to relate under what circumstances he met Mr. Polakoff. He told me that they represented a dress house and had been representing them for months, and that they had spoken to James Sayer about the matter, and that there was a proceeding pending, which proceeding was decided against the clients, and that the clients were pressing him for action. They were terribly disturbed about it.

Q. You mentioned the name Polakoff.

A. I beg your pardon?

Q. You mentioned the name Moses Polakoff.

A. Yes, sir, Moses Polakoff.

Q. Did you know Mr. Polakoff?

A. No. I only knew him by reputation. I mean, I knew he was an Assistant United States Attorney at one time, but I had never met him, nor did I ever speak to him.

Q. Have you met him to this very day?

A. No, I have not.

[fol. 622] Q. Now, you mentioned a proceeding then pending. Was the nature of the proceeding mentioned by Mr. Davis?

A. Yes. He said, referred to a voluntary disclosure that they had made, and a revenue agent—and I think he re-

ferred, that that was a proceeding where there was an adverse decision against them.

Q. Go on and tell me what else he said?

A. He said to me, "Let me relate to you the circumstances under which I met Mr. Polakoff."

I said, "Go ahead."

He said that he was playing cards with a group of men about once a week and one of the men in that group was a lawyer by the name of Polakoff, that one night he spoke to Polakoff for the purpose of introducing him to his brother Moe Polakoff, who was a very able attorney and had considerable experience in tax matters, and he was well known as a trial lawyer, and he met Mr. Polakoff and he told Mr. Polakoff that he had a problem and he stated the problem to him. He said that, "I have this dress case" and he reviewed up to that time the status of it, and he stated that he would like to get a hearing in Washington, a fair hearing, and that he would like to get that hearing before a decision was made to send the case down to the special agent's office.

And Mr. Polakoff replied to him, "I think I know the man who can get me a fair hearing," and Davis said to him, "What is the name of the man?" And Polakoff replied, "The man's name is Henry Grunewald."

Q. Will you stop at that point.

A. Yes.

Q. Mr. Davis testified, or Mr. Hoffman, or both, that you, Max Halperin, suggested that they go to see Mr. Polakoff. Did you make any such suggestion?

A. I certainly did not.

Q. To Davis or Hoffman?

A. I did not. I didn't know Polakoff.

Q. Did you know at that time that Mr. Polakoff knew Mr. Grunewald?

A. I did not.

[fol. 623] Q. Now, you personally knew Mr. Grunewald, didn't you?

A. Oh, for over thirty years.

Q. Now, let us go back.

A. Yes.

Q. He said that Mr. Polakoff had mentioned Mr. Grunewald. Tell us what happened.

A. He wanted to relate the circumstances, I think I have stated, and I said, "Is that the Grunewald that I know?"

"Well," he said, "Max, it must be, because I have heard you talk to him on the phone very many times. I know you go to Washington. I know you had matters with him; business matters, that you have been his attorney. It must be the Grunewald." And he stated, wait a minute, Polakoff and Hoffman had made a trip to Washington and that Polakoff had not given him the results of any conference that he might have had. He didn't mention the name Grunewald at that time; they were talking about a conference; and that Mr. Polakoff said he will not do anything further in the matter until he met the client, and that he was retained by them to act as their attorney.

I said to Davis: "Why don't you retain him?"

He said, "Listen, Max, we are in the case. I have retained Jim Saver in the case. Now, wouldn't it look silly for me to go to a third lawyer at this stage? The clients will lose complete confidence in me and I will lose the case and lose the business."

I said, "What do you want me to do about it?"

He said, "You knew Grunewald well. Why don't you go down and see him?"

"No," I said, "Irving, I don't want to talk to him about a matter like that."

He said, "By the way, who is Grunewald? What is his background?"

"Well," I said, "Mr. Grunewald was an ex-FBI agent during the First World War; he is a public relations man and a confidential investigator for very large industrial firms and banks; Grunewald had told me that he had done [fol. 624] some confidential work for President Roosevelt; that he did confidential work for ex-Attorney General Biddle; that he represented Mr. Hutchinson of the Carpenters' Union; that he did some investigating work for John Lewis; that he was chief investigator for the Lusk Commitee; that he did work for the Pan American Railway and the American Broadcasting Company and for a

number of very large industrial corporations, and that he had a large acquaintance with industrialists, with banks and politicians.

Mr. O'Hara: Excuse me, your Honor. I assume this is all conversation? This is all that happened at this time?

The Court: That is what you told Davis?

The Witness: Yes, sir; yes, your Honor.

The Court: You are not testifying to that of your own knowledge?

The Witness: Oh, no. This is a conversation. That is what I repeated to Davis when he asked me what his background was.

The Court: All right.

The Witness: He said, "How did he attain that position?"—this is the conversation that continues—"How did he attain that position?"

"Well," I said, "he was secretary to a man by the name of Marsh of the Marsh, McLennan Company, one of the largest insurance underwriters in the world, and Mr. Marsh was a multi-millionaire; that he was a very prominent Republican and a large contributor to the Republican Party; and that through Mr. Marsh he had met very prominent people all over the United States, and that, I think, just about that time," I told him, "he was in partnership with ex-Secretary of War Harry Woodring in the importing business.

His reply to that was, "Well," he says, "that is just the kind of a guy we ought to have."

[fol. 625] "Well," I said, "listen, you have Polakoff; let him handle it. You have Saver; let him handle it. I won't go to him. I know of his experience in the FBI and in other matters. I do not believe that he would handle anything like that. I am sure that even if Polakoff did speak to him that he would tell Polakoff the same thing."

And that ended the conversation as to the background of Mr. Grunewald for the time being and anything else.

Q. Now, at that time that you had this conversation did you undertake to do anything with respect to the dress case?

A. I did not.

Q. Now then——

A. I will say that in the next two months he kept on asking me to see Mr. Grunewald and on each occasion I refused to see him about this matter.

Mr. Singer: May I see Exhibit 5, please?

(Handed to Mr. Singer.)

Q. I show you Exhibit 5, which is a power of attorney signed by Morton Marks and I think it bears the date, March 31, 1948.

A. Yes.

Q. Have you ever seen that power of attorney until it was shown here in the courtroom?

A. I have not.

Q. Next, were you present when that power of attorney was signed?

A. No, sir.

Q. Next, were you told that it was signed?

A. No, sir.

Q. When you were having this conversation with Mr. Davis?

A. No, sir.

Q. Now, can you fix the time of this conversation that you have related with respect to Polakoff by that power of attorney? Does that help you in any way at all?

A. Well, it still could have been before that.

Q. You don't know?

A. No, it doesn't really refresh my recollection, no.

[fol. 626] Q. Now, you said a moment ago, I think, that you had several talks with Davis along this same line for some couple of months after.

A. Yes. I mean after I finally said, "Irving, let us drop this subject," then he would come in every week; we were sitting around there; he used to sit in my office when he had nothing to do most of the time, and he would say, "Come on, go down and see what you can do. What have you got to lose? Go down and talk to him."

Q. Now, do you remember what happened then, and try to fix the time?

A. Well, to the best of my recollection, Mr. Singer, a few

months passed, maybe three months. Then one day, Irving——

Q. Before you get to that, was it the summertime, the spring, the autumn?

A. I would say it was about the middle of the year. To the best of my recollection I would say it was about June, 1948.

Q. Now, did you have another talk with Mr. Davis?

A. I did, yes.

Q. And where was this talk?

A. In the office, one of the rooms.

Q. Now, tell us what you said and what he said, as best you can remember.

A. Well, he came into my room and he said, "Max," he says, "the Pattullo case is now in the special agent's office."

Q. Now, just stop there. There has been testimony here by Government agents that the Pattullo case came to the special agent's office in the early part of February, 1948. Did you hear that testimony?

A. I heard it, yes, sir.

Q. Would you then assume that this conversation was certainly after that time?

A. Oh, yes, considerably after that.

Q. Now, tell me what you said and what he said.

A. Davis said to me that the case was referred to the [fol. 627] special agents' office and that Mr. Jim Saver told them that it was a wrong decision, that the Government was absolutely wrong in the position that they have taken, that in his opinion it was a voluntary disclosure, and that he has been down to 253 Broadway, the special agents' office.

Q. Who has?

A. Mr. Saver.

Q. Who said that?

A. Davis told me.

Q. Go ahead.

A. He said he had made an arrangement, that Saver has made an arrangement with some of the special agents that the Pattullo clients will make a voluntary confession, will

submit their books and records for examination and give them all the information that the special agents wanted.

"Now," he said, "what is your opinion?"

I said, "I don't know anything at all about it. I am not interested, to begin with."

He said, "I don't like to take that chance. I don't know where I am at."

"Well, of course," I said, "you should give the thing very serious consideration, to open up your records and your books."

So he said, "Now look here, Max; I have asked you to go to Washington, you refused to do it. I am afraid I am going to lose this case. The clients are pressing me continuously for action. I have had conversations with them on the phone and I have been down to see them, and you have seen them around this office; and they say that this thing has been going on now for a year since we were retained by them and we are getting nowhere."

I said, "Irving, what do you want me to do?"

He said, "Listen, you are in this office here; you are not a third party? I want you to meet the clients. I want you to talk to them. After all you have been practicing law for forty years."

"Well," I said, "I am not a tax lawyer, Irving, and what am I going to talk to them about?"

[fol. 628] "Well," he said, "it is not a question of taxes; it is a question of giving somebody practical advice, using common sense. I want to hold on to this case. There is a very substantial fee in this case. I don't want to lose it, and I believe that you will make an impression on them by talking to them. You will appease them."

"Well," I said, "what do you want me to talk to them about?"

So, he took out a paper which I think is an exhibit here.

Q. Just a minute. I show you Defendant's Exhibit N-1. Have you seen that paper before (handing)?

A. I certainly did, yes, sir.

Q. When did you see it?

A. At the time of this conversation that I had in June, sometime in June.

Q. Who gave that paper to you?

A. Irving Davis gave me the paper.

Q. May I have it?

A. All right. I thought I would want to read it.

Mr. Singer: I will read it to the jury. It has never been read.

Mr. MacMahon: Your Honor, that is not in evidence.

Mr. Singer: I beg your pardon. It is in evidence.

The Court: Let me see it. Is it in evidence?

Mr. Singer: Of course it is. The photostat was marked first and then this. It is Exhibit N-1.

Mr. MacMahon: I am wrong, your Honor.

Mr. Singer: Well, that's why they have erasers on pencils.

(Mr. Singer read Defendants' Exhibit N-1 to the jury.)

The Court: That I believe is the memorandum Mr. Davis identified as having written out——

Mr. Singer: Yes.

The Court: Just so that we know where it came from.

[fol. 629] Q. Mr. Halperin, when you got this paper, Exhibit N-1, did you know what a Form 870 was?

A. Well, yes, I understood what a Form 870 was.

Q. Did you know what a 917 was?

A. Well, I heard it was an information return. I have never had an experience along that line.

Q. After you got this paper, did Mr. Davis have anything more to say about it?

A. Well, I said to him, after I read it, "It don't mean too much to me." I said, "Saver will understand all that."

Q. You mentioned Jim Saver or James Saver. This was in 1948. Had you met Mr. Saver up to that time?

A. No, I did not.

Q. So that we can carry that situation on, did you meet him during 1949?

A. 1949? I did not.

Q. Did you meet him during 1950?

A. I did not.

Q. 1951?

A. I don't think so.

Q. When was the first time, to the best of your recollection, that you met Mr. Saver?

A. I think I met him in Washington, D.C. in 1952. I think it was, if I am not mistaken about the date.

Q. Had you heard of him at this time back in 1947 and 1948?

A. Oh, yes, I have heard of Mr. Saver certainly.

Q. Let us revert back to your talk to Mr. Davis. What else did he say to you?

A. He says, "Now, Max, you are in this office. You are a lawyer. I want you to meet the clients. I want you to talk to them. You will be paid for your services. I want you to go to Washington. I want you to find out about a voluntary disclosure, what the policy of the Department is."

He says, "There were no reported cases on the subject, but some rule was laid down and I want you to find out what it is and when it becomes effective." And he says, "When the clients come in, tell them what you are going to do. Tell them you are going to go to Washington. Tell them you are going to look into this thing."

[fol. 630] I says, "Well, Irving, if you want me to do that, there is no harm in that, I certainly will."

Q. What happened after that?

A. Well, I think it must have been a day or two or three days, Mr. Marks came into the office, who as I said before I had seen him around quite frequently, and he went into Davis' room and then Mr. Davis asked me to come in.

Q. Mr. Halperin, did you have this paper, Exhibit N-1, with you when Mr. Marks was there?

A. Yes.

Q. Tell me what you discussed with Marks and what he said, as best you can, what Mr. Davis said, and what you said.

A. Well, Davis first introduced me to Mr. Marks. He says, "Now, you have seen Mr. Halperin around here for quite a while. He has been associated with me since 1939. He is a lawyer of some experience. I want him to go to Washington and find out what the policy of the Department is. I want him to talk to people in the Department. I want him to see someone there, and when he comes back, he will give you a report on it."

Mr. Marks at first said, "Well, now, listen, this is going on now for a year." He says, "What do you think about it, Mr. Halperin?"

I says, "I can't really give you an opinion to be honest with you." I says, "I will be very glad to look into the matter and see what could be done, and I will report that to Mr. Davis, and when you come in again, I will talk to you about it."

Q. Did you discuss voluntary disclosure at that time?

A. Oh, absolutely. That subject was brought right out before Mr. Marks. We discussed that. Not only that, but I said to him, "I think that you have a valid contention there."

Mr. Singer: May I see Government's Exhibit 11 and Government's Exhibit 14?

Q. I show you Government's Exhibit 11, which is the check of Pattullo Modes to Schopick & Davis for $7,500, bearing what date?

A. June 9, 1947.

[fol. 631] Q. Were you present when that check was delivered or received?

A. No, certainly not.

Q. Did you know that any such sum of money had been paid when Mr. Davis was discussing this with you?

A. I did not.

Q. Now, I show you part of Government's Exhibit 14, the first two checks, one for $5,000, dated December 29, 1947, and one for April 2, 1948. The first one is for $5,000 and the second for $12,500 (handing).

A. Yes, sir.

Q. Did you know at that time or did Mr. Davis tell you that he had received $25,000 in fees from Pattullo Modes at the time he was talking to you?

A. He did not.

Q. Did he tell you how much he had collected?

A. Well, at one time he told me—when I came back from Washington, after making a trip he told me—that he received $7500.

Q. Was it here in the courtroom for the first time that you saw these checks for $5000 and $12,500?

A. Yes, certainly, of course.

Q. Go on. What else happened after you talked to Mr. Marks? Was that the end of the conversation?

A. Before Mr. Marks left, it was agreed—I seemed to settle his mind a little. I won't say that he was completely satisfied, but he was satisfied that I would make some effort to find out about this voluntary disclosure, what the policy of the Government was in Washington.

Q. Go ahead.

A. And he left.

Q. Now, what did you do?

A. I went to Washington.

Q. Mr. Hoffman has testified, I think, that he went to Washington with you in the summer of 1948. Did Mr. Hoffman go with you to Washington in the summer of 1948?

A. No, sir.

Q. Mr. Hoffman, I think, has testified that he went with you to the Washington Hotel, that there he saw you and Mr. Grunewald talk together. Did any such thing happen?

A. Never took place.

Q. As a matter of fact, did you ever go to the Washington Hotel with Mr. Hoffman?

A. I did not.

[fol. 632] Q. Whether it be in 1947 or 1948 or ——

A. Or any time. I never went with Mr. Hoffman to the Washington Hotel.

Q. Let us reverse it. Did he go with you?

A. He did not.

Q. Or was he there when you were there at any time?

A. He was never there at any time when I was there.

Q. You had been in Mr. Grunewald's apartment at the Washington Hotel, hadn't you?

A. Many times, many, many times.

Q. Were you ever there with Mr. Hoffman or when Mr. Hoffman was there?

A. I said, Mr. Singer, I was never there when Mr. Hoffman was there, never.

Q. So far as you know, from your own knowledge he wasn't there when you were there?

A. That is absolutely so.

Q. Let us go to the Munsey Building, while we are on this subject. Was there ever a time when you went to Washington and went to the Munsey Building to see Mr. Grunewald with Mr. Davis?

A. I never went to the Munsey Building with Mr. Davis.

Q. You have been in the Munsey Building?

A. Well, that was probably in 1944 or 1945; I don't recall. Mr. Grunewald then was associated with a group of lawyers. He had an office there before he had the suite of rooms in the Washington Hotel, and when I went to Washington, I used to go over to the Munsey Building.

Q. Was Mr. Davis ever with you on such an occasion?

A. Mr. Davis never went with me to the Munsey Building, and, so far as I know, he never met Mr. Grunewald until——.

Q. You can tell us about that later. Until when? You might just as well finish the date.

A. I think it was 1950, and that was purely an accidental meeting.

Q. You tell us about that when we get to it.

A. All right, sir.

Q. We were back now when you went to Washington. When you went to Washington, you went then in connection with the Pattullo matter?

A. I did.

[fol. 633] Did you go yourself alone to speak to Mr. Grunewald about it?

A. I didn't get that question.

Q. Did you go alone to talk to Mr. Grunewald about the Pattullo case?

A. About the Pattullo case?

Q. Yes.

A. Never spoke to him about the Pattullo case.

Q. What did you do about it when you went to Washington?

A. I had a discussion with a lawyer by the name of Bill Davis, whom I had known and met before. Bill Davis at one time was counsel in the Revenue Department. He was a trial lawyer for ten years and has tried tax cases all over the country. I discussed with him this question of the voluntary disclosure. I also went over to the Treasury

Department—I think it is opposite the Department of Justice, 11th and Constitution Avenue—is that where it is? I don't know—well, it is immaterial—I went up there and spoke to some of the counsel, and they told me that, Mr. Winchell, who at one time was chief counsel for the Revenue Department, had formulated a plan and laid down some departmental definition—I put it that way—of what a voluntary disclosure really is.

I had spoken to any number of people in the Department, and I have never run across a proposition where there was such a difference of opinion by men in the Revenue Department. One said that in order to have a voluntary disclosure, it must be done before——

Mr. O'Hara: Your Honor, I object to what was said unless we identify whom he talked to. If he will give me the name of any man he talked to, we will let him say it.

Q. Tell me, after you went to Washington, did you keep this information you had gotten to yourself?

A. I certainly did not. I made a memorandum in writing, in my own handwriting, in my office. I discussed it with Davis. He read the memorandum. I put it——

Q. Did you tell Davis what you had learned?

A. Of course I did. That was my purpose.

[fol. 634] Q. Go ahead.

A. The objection came in, I don't know whether his Honor ruled on it——

Q. You go ahead. Tell us what you told Davis.

The Court: You are going to tell us now what you told Davis?

The Witness: Yes. I didn't want to say anything that was irresponsive.

I told Davis I had spoken to a number of lawyers in the Department.

The Court: Did you give their names to him?

The Witness: I gave him the names, yes, your Honor.

The Court: Then you had better give the full conversation and give the names.

The Witness: I haven't got the names.

The Court: You haven't got the names?

The Witness: I don't remember the names. I made a memorandum and gave it to Mr. Davis.

Q. Have you seen that memorandum since then?

A. Last time I saw it was around, I would say, in the beginning of 1952. It was in a private file of my own marked Pattullo. It was not with their file. I kept that separately. In other words, everything I did, every conference I had, every trip that I made, I recorded that in that memorandum and I put it in the file.

Q. What happened to that file?

A. It disappeared. It disappeared at a time when I had a very serious fight with Davis——

Q. We will come to that.

A. We will come to that later on, all right.

Q. You say you had a talk with Davis and you told him. Go ahead, finish that conversation.

Q. Well, I told Davis about Mr. Winchell's rule, and that there was quite a difference of opinion among some of the lawyers in the department. One said that in order to have a valid voluntary disclosure, a genuine voluntary [fol. 635] disclosure, you must disclose what your clients have done even before an audit was made by a revenue agent.

Someone else told me that you must submit everything that you want to disclose to the Commissioner of Internal Revenue in writing.

Another opinion I got was that you must make a voluntary confession, like if you have committed a crime, and you must swear to it.

Another lawyer stated to me that in his opinion, if you make the disclosure any time before a jacket is opened in the special agent's office, in which you state that you are willing to pay penalties, interest and the amount of the taxes and disclose everything, the absolute truth, that that would be another method.

I came back and I reported all these conferences that I have had with Davis.

The Court: You can't remember the names of the lawyers, you said. Where were they? Were they lawyers in the Treasury Department?

The Witness: Yes, sir, in the Treasury Department, except this Mr. Bill Davis.

The Court: In what part of the Treasury Department?

The Witness: In the legal division, in the general counsel's office?

Q. Go ahead.

A. As I say, when I returned, I made a memorandum of all that. I had a conference with Davis, and then he called in his client, and I met the client again.

Q. Who came in?

A. Mr. Marks, and it could be that Marjorie Segel was there. I think they both came in, now, thinking of it. I think they were both in. I reported to them. I told them about this Bill Davis, that I spoke to him; that he thought we had an absolutely valid defense. I told the clients that after my talk with the attorneys in the general counsel's [fol. 636] office, I am convinced myself that there were valid reasons to press that situation that it was a voluntary disclosure.

The Court: Do you have a Treasury card?

The Witness: I didn't have a Treasury card until 1949.

The Court: Did you identify yourself as being there on any case when you were there?

The Witness: I did not.

The Court: They did not ask you——

The Witness: They did not ask me a thing.

The Court: —or whom you represented or for your Treasury card?

The Witness: No, sir.

The Court: You just walked into the general counsel's office and said, "Give me some opinions on the case, and I won't tell you the name of the case"?

The Witness: I didn't say I wouldn't tell them. They never asked me the name. I didn't say I wouldn't tell them, but I went in and they gave me the information.

The Court: All right.

Q. Did you know, as Davis has so testified, that this whole voluntary disclosure was a fraud and a framed-up defense? Did you know that?

A. Well, I heard him testify here.

Q. Did you know it back in 1948?

A. No, I certainly did not. On the contrary, he said it was a legitimate voluntary disclosure.

Q. Did you discuss this with Smith at all in 1948?

A. With Smith?

Q. Yes.

A. I don't think I ever spoke to Smith in my life. He used to come in the office and greet me, but I never entered into any conversation with him. He never spoke to me. He seemed like a nice man, but we had nothing in common. [fol. 637] Q. Incidentally, was Mrs. Segel present when voluntary disclosure was discussed in 1948?

A. At that second conference, absolutely, she was present. I recall that.

Q. Tell us what you said and what they all said.

A. Well, I told them the result of my conferences with Mr. Davis in Washington and what his opinion was. I told them of my conferences with the lawyers in the general counsel's office, and they were quite encouraged; but I also said that I think they ought to get a definite ruling, and I told that to Davis, that they ought to get a definite ruling from the Treasury Department in Washington before they would disclose their books and make a confession.

Q. What happened after that?

A. Well, after that—I don't recall the month—but I have a recollection that it was around the month of September or October probably—don't hold me to dates. There are certain things that have made an indelible imprint in my mind, that I will remember to my dying day, but there are certain things that I cannot remember. I said to Davis—he says, "Max, what is your opinion?"

I said, "Irving, I think you ought to give this matter a little further consideration before you make that kind of a move."

Q. What kind of a move was that?

A. Well, to disclose their records, to go into the special agents' office and tell them everything, until they were assured that they will get something in return for it.

Then, around September or October, I believe, he told me that Mr. Saver spoke to Davis, that he told Davis——

The Court: Davis is telling you that Saver told him this?

The Witness: Yes. He said that Jim Saver was down the special agents' office and that he had made some arrangement for the clients to appear there. And Irving said to me, "I certainly don't want that." He said, "I want to get a hearing in Washington. I want to get [fol. 638] a ruling there. I don't think I can get a fair hearing in New York."

I says, "Why not?"

"Because," he says, "in New York, they will have to overrule the revenue agent, which they wouldn't do. In Washington they will render an opinion and a decision on a broad policy. They won't pay any attention to what the agent said. They will just simply render an opinion on what a voluntary disclosure is and whether it was made in time."

I says, "Well, listen, Irving, I have been down to Washington quite a few times on this matter. Why don't you see Jim Saver and I would like to see him myself."

He says, "Listen, Max, I can't take you down. I would like to take you down. After all," he says, "Jim Saver has been an Assistant Attorney General of the United States. He has been an Assistant United States Attorney in the Eastern District of New York. He has tried many fraud cases in taxes. He is not going to listen to you. He might be insulted. I don't want to offend him. You don't know him. It would be an entirely different thing if you knew him.

I says, "Well, why don't you tell Jim Saver to go to Washington and get a ruling before you make any decision to disclose your books?"

"Well," he says, "that is just exactly what I am going to do."

Q. What happened after that?

A. Saver went to Washington.

Q. You didn't go?

A. Oh, no. Saver went to Washington.

The Court: How do you know?

The Witness: Davis told me that he went to Washington.

[fol. 639] The Court: All right. Now, next question.

The Witness: Davis told me that he went to Washington.

Q. Do you remember when it was that Davis told you that?

A. I think it must have been around October or November. I don't know. As I said, I cannot remember——

Q. Let me show you Government's Exhibit 39-B in evidence, which is the check of Schopick & Davis to your order for $2,500, dated what date?

A. November 10th.

The Court: What year?

The Witness: November 10th, 1945. Oh, no—1948. Pardon me, I should have my glasses on.

Q. Does that check or the date of that check refresh your recollection as to the time of this conversation about Sayer going to Washington?

A. Yes, it does.

Q. Was it before the time when you got that check?

A. Yes, it was before.

Q. How long before was it, would you say?

A. I think a short time, maybe a week or so.

The Court: How many times had you been to Washington before you received that check on the Pattullo case, because you have only testified to once so far?

The Witness: No, I have been there, I would say, four or five times.

The Court: You have only testified to going down once to see some people in the Treasury Department.

The Witness: Yes, and then I also testified—I don't know whether I got to that. I did make several trips to see Davis.

Q. The Court has asked you a question. In that connection, may I show you Government's Exhibit 40 in evidence, which is a check bearing date August 24, 1948, in [fol. 640] the sum of $200 (handing). Do you remember receiving that check?

A. Well, I don't remember receiving it, but I undoubtedly received it.

Q. Do you know what it was for?

A. Disbursements, I believe.

Q. Was that in payment of your expenses for trips to Washington?

A. Yes, sir.

Q. In connection with the Pattullo matter?

A. Yes, sir.

Q. Incidentally, while we are on that subject, and just before I ask the Court to give me a five-minute recess, before we get beyond it, did you ever go to Washington at all or even talk of going to Washington in connection with the Gotham Beef case?

A. I certainly did not.

Q. So that this $200-check, which I have just shown you, Exhibit 40—is that right? Look at the back of it.

A. Exhibit 40.

Q. —was the repayment for disbursements that you had as best you can remember in the Pattullo matter?

A. Only in that, yes. I had no other reason—there were no disbursements in any other matter. I didn't go down on anything else.

Mr. Singer: May I have a recess now?

The Court: Yes, we will take our afternoon recess.

(Short recess.)

Q. Now, Mr. Halperin, I showed you a check which was Government's Exhibit 39-B, November 10, 1948 for $2,500?

A. Yes, sir.

Q. Now, before you received that check, do you remember, and now I am just directing your attention to the incident, do you remember a talk with Mr. Davis about a vault?

The Court: About a what?

Q. A vault.

A. A vault? Oh, yes.

(Marked Defendants' Exhibit FF for identification.)

[fol. 641] Q. I show you this paper Defendants' Exhibit FF for identification and I ask you whether that slip of paper refreshes your recollection as to the time when you had the conversation with Mr. Davis about the vault.

Mr. O'Hara: Your Honor, there hasn't been any indication that the witness doesn't have a recollection of the time up to now.

Mr. Singer: We will fix the exact date.

The Court: Fix it.

Q. Can you, Mr. Halperin?

A. I would say it was the early part of October. It may have been around the 7th or 10th or 8th. I don't remember.

The Court: 1948?

The Witness: 1948, your Honor, yes.

Q. Now, then, would you tell us where the conversation about the vault took place?

A. The conversation took place in my office, our office, I will put it that way.

Q. Who was present?

A. Just Mr. Davis and myself.

Q. Now, will you tell us what was said, what he said and what you said and then tell me what you did?

A. Mr. Davis told me that he had some very confidential reports, brokers accounts, work sheets and several books that he didn't want to keep in the office.

Q. Did he tell you what firm?

A. The Pattullo people.

Q. Go ahead.

A. He said he didn't want to keep them in the office, that if they were lost it would be absolutely impossible to replace them, and he asked me to do him a favor. I said, "What do you want me to do?"

"Well," he says, "listen, you had a vault in the Chemical Bank for a good many years. I would like to have you take these papers and records and bring them over to the Chemical vault."

There were two books, I believe, Mr. Singer, and they had some rope around them, and a couple of bundles of papers which were completely exposed.

[fol. 642] I said, "Irving, why don't you put it in your own vault?"

"Well," he says, "Max, my vault in the first place is uptown and I am going to be very busy on this Pattullo thing now. Now I have to devote practically 100 per cent of my time. You are in the case. You are getting paid. What difference does it make if you take these papers over to your vault?"

I said, "Listen, Irving, in the first place these papers or books will never fit in my vault. I have a pretty fair sized vault." It was $25 vault in which I kept wills for

clients and other papers of my own, insurance policies and so forth, and I said, "Those things are never going to get into my vault."

"Well," he said, "go over there and hire a vault. Get as large a vault as you want."

"Well," I said, "all right, if you want to pay for it, it is all right with me."

I went over to the Chemical Bank according to this receipt on October 14, 1948.

Q. Now, did you open a vault?
A. I opened a $60 vault.
Q. Did you pay for it?
A. It was debited to my account.
Q. Charged to your account?
A. Well, charged to my account.
Q. And did you receive a receipt?
A. I got this receipt.
Q. A record from the bank?
A. Yes, sir.
Q. Concerning it?
A. Yes, sir.
Q. And is this the record, Defendants' Exhibit FF for identification?
A. This is the record, yes, sir.
Mr. Singer: I offer it in evidence.
The Court: Any objection?
Mr. O'Hara: No objection, your Honor.
The Court: All right, received in evidence.

(Marked Defendants' Exhibit FF in evidence.)

Q. That was October 14th, was that?
A. Yes, sir.
Q. Thank you. Now, did you put anything into that [fol. 643] box?
A. Yes. I put the two books and I put the two bundles of papers which he told me were work sheets and confidential statements of the clients, the individuals, and I put them in the box.
Q. Now, then, did you ever take those packages out?
A. Oh, four or five times I brought them to the office and then I would bring them back to the vault.

Q. Now, do you remember the last time you handled the packages or books and papers that were in that vault?

A. Well, I think it was the latter part of December 1948 or the beginning of January 1948 when Irving Davis——

The Court: 1949, you mean?

The Witness: 1949, I beg your Honor's pardon. 1949. December 1948 or the beginning of 1949 when Davis asked me to bring those books, records, confidential statements and work sheets of the accountant to the office. At about that time he had received word from Mr. Saver——

Q. About what time are you talking about?

A. Well, around that time.

Q. What time?

A. Either December or January.

Q. Go ahead.

A. That he had received word from Mr. Saver that he had been in Washington.

Q. Didn't that happen in October or November?

A. Well, it could have been November. As I say, it could have been November.

Q. Look at that check for $2500. Does that refresh your recollection?

A. Yes, it does refresh my memory, because that is when I discussed fees with him.

Q. What date is that, the check for $2500?

A. That check was November 10, 1948.

Q. Was it before you got that check that he told you about Saver being in Washington?

A. Yes, sir.

Q. Now, we weren't discussing that; we were discussing the last time you went to that box, the vault, for which [fol. 644] Exhibit FF was offered in evidence.

A. Well, the last time I went to that box was, as I said, Mr. Singer, either the very, very late part of December after Christmas or January, or the very beginning of January.

Q. Let us go back to this incident before November 10th. Now, did you have a talk with Mr. Davis at or about the time you received that check for $2500?

A. In reference to what? To my fee?

Q. The fees and about what you testified to, about Mr. Saver having been in Washington.

A. Well, Saver had been in Washington he told me, Mr. Davis, and that he had received a favorable decision; that is, that he was told that if he went into the special agent's office and made a confession, that is, on behalf of his clients, that his clients appear there, and they would produce their records and their books and make truthful statements to the Government, that there would be no criminal prosecution. And I said to him, "Well, that is certainly very good."

And he said to me, "Well, in a measure you are entitled to some credit for it."

I said, "What credit am I entitled to?"

"Well," he said, "you got the clients to stick in the office," I mean, keep on retaining them, and we finally got the result we were looking for.

"Well," I said, "you certainly don't have to worry; the Treasury Department will never go back on any promise they have made."

"Well," he said, "of course, I suppose they will have to examine the clients very carefully."

I said, "Certainly they will."

And he said, "They will want net worth statements."

I said, "They certainly will want net worth statements."

Q. Did you discuss fees?

A. Well, at that time, yes. I said, "Now, look here, Irving, what about my fees that you promised me?"

He said, "What do you expect?"

[fol. 645] "Well," I says, "how much did you get?"

"Well," he says, "I got $7,500."

Q. We now see he had actually got 25——

A. I certainly didn't know it. He got $7,500, and we began to discuss the matter and we finally arrived at an agreement. He said, "Supose I give you a check for $2,500? That is one-third of the fee."

I said, "That seems to be reasonable. That is agreeable."

He said, "Of course, there will be more money coming in later."

"Well," I said, "just give me that check now for $2,500," and he gave it to me.

Q. And you received that check?

A. Yes, I received a check for $2,500—I beg your pardon.

Q. 39-B in evidence.

A. Yes, that is right. $2,500.

Q. Now, did you go to the Treasury Department in New York, to the special agent's office in connection with any hearing?

A. No, I did not. They had Mr. Saver, and besides——

Q. You didn't go?

A. I didn't go.

Q. Now, there has been testimony here only by Davis and by Hoffman that at some time or another there was a package of $100,000 given to you and that you put it in a box. Did any such thing happen?

A. Never happened. I never saw a package with $100,000 or with any amount, with $5,000 or any sum. They never gave me a package to put in the box.

Q. In this box we are talking about?

A. I could have put it in my own box. I had a $25 vault which was large enough to carry all kinds of securities and plenty of cash.

Q. Now, was there ever a time when you agreed to hold the $100,000 in the Pattullo matter, to turn it over to anyone in the event that there was no criminal prosecution?

A. Absolutely not.

[fol. 646] Q. Now, this box for which Exhibit FF was offered, was this box in the name of yourself and anybody else?

A. Well, it was in my name but I believe that the custodian, I mean, the man that had charge of the vaults, he gave me a card, because I have always had my wife on any vault that I have had in that bank. It is the only bank I ever carried a vault, and he gave me a card and I had my wife sign it. As a matter of fact, if I knew that the vault was going to be held for an indefinite period of time, I would have given my vault up and just retained that one.

Q. Now, did you have any discussion with Davis about the fact that your wife had access to this vault?

A. Never had any discussion about that at all.

Q. Did Davis ever say there was money in this package that you were putting in this vault?

A. He never did.

Q. Now, before you ever got the money had you ever discussed the Pattullo case with Mr. Grunewald?

A. I never discussed the Pattullo case with Mr. Grunewald in my life.

Mr. O'Hara: Could we have the question read, your Honor?

Mr. Singer: I misspoke myself.

Mr. O'Hara: I just wanted to hear the question. May we have the question read? The witness answered. I would like to hear the question.

Your Honor, may I have it read?

The Court: The question was answered.

Mr. Singer: I withdraw the question.

Mr. O'Hara: The question has already been answered.

Mr. Singer: I asked him the question before you got the money. I know what I said. You know, and it only proves my very point——

The Court: Let us ask another question.

Mr. Singer: Now, if you want to make much of it, I would like to have it settled right now. Let us have the question read.

[fol. 647] By Mr. Singer:

Q. Now, Mr. Halperin, before you ever got the box did you ever have any discussion with Mr. Grunewald about money in the Pattullo case?

A. I did not.

Q. Was Davis ever present? Did any such thing happen where Grunewald said in the presence of Davis or anyone else that he would take $100,000 or any sum of money in the Pattullo case?

A. No such conversation was ever had, and Mr. Davis was never present at any time when I was present with Mr. Grunewald except——

Q. Except.

A. We come to that later.

Q. Now, did you receive any money for Mr. Grunewald in the Pattullo case?

A. Did I receive any money for him? A. I did not.

Q. Now, there came a time in January, 1949,—do you remember Mr. Hoffman testified something here about inauguration tickets?

A. Yes, sir.

Q. Mr. Davis testified that he, Mr. Davis and Hoffman and Schopick went with you to this vault in the Chemical Bank where they counted, they say, the sum of $100,000. Did any such thing happen?

A. No such thing ever happened, Mr. Singer.

Q. Did they ever go with you to that bank?

A. They never went with me to that bank.

Q. Did you ever go to that bank and take the box out and bring it into a large conference room where you all sat around and counted the money?

A. Never happened.

Q. Now, did you ever come back to your office with a package of money in January, 1949, and put it in a brief bag, another brief bag that belonged to Hoffman, and take a train to Washington with it?

A. I did not.

Q. Is it true that you met Mr. Grunewald at the station in Washington?

A. At the Union Station?

Q. Yes, the Union Station. Is that correct?

A. Oh, yes. I met him many times at the Union Station. [fol. 648] Q. Now, do you remember the incident of the inauguration of President Truman?

A. Yes.

Q. In 1949?

A. Yes, I do.

Q. Did you go to Washington?

A. I went—I attended a party that Mr. Grunewald gave on the first floor of the Washington Hotel; on Inauguration Day, we had a view of the parade, and he had quite a party.

Q. And did Mr. Hoffman go to Washington with you at that time?

A. He did go to Washington.

Q. Will you tell us the circumstances under which that occurred?

A. Well, during the day or a day before I had stated in the office that I expect to attend the inauguration of President Truman and I said I think I will leave the next day. I just don't remember the date, but it was very close to the inauguration date; it might have been a couple of days before. Hoffman heard that and he first said to me that he has got some business in Washington, he wants to see someone in the Federal Communications Commission, one of the members. He said he had some business with him, and he said that he expected to fly down there but he was delayed in the office and he says, "Max, what train are you making to Washington?"

I said, "I am making the Congressional Limited."

He said, "Do you mind if I come along?"

I said, "Certainly not."

He said, "Maybe I can get a couple of tickets for the inauguration."

So, we were on the train. I left my bag in the car, my night car. I had a Pullman seat. And I went into the club car to have a drink or two, and then Milton Hoffman came into the car. And I believe after we left Philadelphia we went into the dining car and we had our dinner.

Now, we arrived at the Union Station. I think the train was on time. It was probably around 7.35 or '40. It leaves here around 4.30.

The Court: 4.30.

The Witness: 4.30, doesn't it? On the odd hour. At [fol. 649] any rate, we got in there about 8 o'clock and Mr. Grunewald met us at the station. He told me that he had his wife and daughter and his son-in-law outside, and I introduced him to Milton Hoffman.

Q. Was that the first time?

A. That is the first time that he ever met Milton Hoffman. The very first time, to my knowledge, certainly.

Q. The first time Milton Hoffman ever met him to your knowledge?

A. Yes, sir.

Q. Go ahead.

A. And I introduced him. I don't think it took more than a minute, and I said, "Henry, Hoffman here would like to attend the inauguration." I said, "Have you got a couple of tickets for him?"

And he took a batch of tickets out of his pocket. He must have had eight or ten, and he was particular about giving him a choice of the seats too. So he handed him two tickets. I think I said to Henry, I said, "Can you take Milton Hoffman to his hotel?"

He said, "I would only be too happy to do it, but I haven't got any room. My daughter is out, my son-in-law," and I think he said, if I am not mistaken, Charlie Burke, who at that time was alive, and he was driving the car. And that was the end of the conversation and nothing else took place.

Q. Did you take any money, $100,000, with you on that trip to give to Mr. Grunewald?

A. Well, I think about the only money I took with me was about $50 or $60 or $100. I had in my pocket—well, I better answer the question. I did not.

Mr. Singer: May I have Government's Exhibits 66 to 70 inclusive? And while I am at it would you be good enough to give me Government's Exhibit 6?

Q. Now, Mr. Halperin, would you please write your name? Do you have a pen? Use your own pen. Write "Max Halperin, New York, N. Y." about three or four [fol. 650] times on that piece of paper.

A. Spell out "New York", or just "New York, N. Y."?

Q. Spell it out, "New York, New York."

A. (Witness writes on the pad of paper.)

Is that enough, two or three times?

Q. Yes. Now, I show you Government's Exhibits 66 to 70 inclusive. Start with Exhibit 66. Is that your handwriting?

A. It is not.

Q. Did you sign that register?

A. I did not.

Q. Did you stay at the Washington Hotel or use a room in the hotel on that day?

A. I did not.

The Court: What was the date?

Mr. Singer: December 14, 1948.

Q. Now, I show you this paper, Government's Exhibit—oh, incidentally, were you in the Washington Hotel or did you use a room in the Washington Hotel from 12:19 p. m. to 10:50 a. m. on December 15th?

A. No, I did not. I want to state that I have never stopped at the Washington Hotel unless I slept there all night or took a room.

Q. The first one happens to be a charge for an overnight stay from 12:19 p. m.on December 14th to 10:50 a. m. on December 15th.

A. No, I wasn't there because I would never take that kind of train. I only took the Congressional Limited when I went there, or unless I took a plane.

Q. Now, I show you Government's Exhibit 67. Did you sign that registration card?

A. No, sir.

Q. Were you at the Washington Hotel on December 21, 1948, from 1:45 p. m. to 2:41 p. m.?

A. The same day?

Q. The same day.

A. Same hour?

Q. Yes.

A. No.

Q. For 55 minutes?

A. No, sir.

Q. Now, I show you Government's Exhibit 68 in evidence. Did you sign that registration card?

A. No, sir.

Q. Were you at the Washington Hotel on December 31, 1948, before New Year's, from 3 p. m. in the afternoon until 5:48 p. m.?

A. No, sir.

[fol. 651] Q. Approximately two hours and 16 minutes?

A. No, sir.

Q. Now, I show you Government's Exhibit 69, January 3, 1949. Were you in the Washington Hotel on that day?

A. No, sir.

Q. Did you sign that registration ticket?

A. No, sir.

Q. Were you there from 3:28 p. m. to 7:13 p. m.?

A. No, sir.

Q. Approximately four hours?

A. No, sir.

Q. Now, I show you Government's Exhibit 70 in evidence. Did you sign that registration card?

A. No, sir.

Q. Were you at the Washington Hotel from 3:32 p. m. to 5:52 p. m. a little less than two hours?

A. No, sir.

The Court: On what date?

Mr. Singer: On January 13, 1949.

The Witness: No, sir.

Mr. Singer: Now I offer in evidence the defendant's handwriting.

Mr. O'Hara: No objection.

The Court: Received in evidence.

(Marked Defendants' Exhibit GG in evidence.)

Mr. Singer: Now, may I at this time read from Government's Exhibit 61 in evidence, which is Mr. Grunewald's bills at the hotel? May I state, and I have had yesterday during the trial this verified, that none of the items—let us put it this way: First, I have no bill offered in evidence for December 14th. Apparently no records have been produced. Am I correct in that?

Miss Goldman: Yes.

Mr. Singer: However, for December 21, December 31, January 3 and January 13, 1948 and 1949, following each other, there is no charge to Mr. Grunewald's account for any of these bills, Exhibits 66 to 70, inclusive.

[fol. 652] The Court: I think that is conceded.

Mr. Singer: Am I correct?

Mr. O'Hara: The Government will concede that this account here, as this account is charged, Exhibit 61, does not have the charges which Mr. Singer has just referred to.

Mr. Singer: Is there any other exhibit present in the courtroom, offered in evidence, that will show any of the charges in any of these five exhibits, 66 to 70, to Mr. Grunewald's account?

The Court: Are those bills marked paid? They are shown on the face to be paid, aren't they?

Mr. O'Hara: It does not, your Honor.

Mr. Singer: It shows charged to his account, and there is no charge to the account.

The Court: Charged to whose account?

Mr. Singer: It says Grunewald. One place it says Griswold.

I say if there is a record, I would like it produced now, if it is in evidence.

Mr. O'Hara: Your Honor, I know of no such record.

Mr. Singer: Under those circumstances, I now ask——

Mr. MacMahon: Your Honor, if he wants any records from the Washington Hotel, certainly Mr. Singer can subpoena them.

Mr. Singer: Now, look, you made a statement——

The Court: Let us go ahead.

Mr. Singer: I want to answer it. I asked the witness from the hotel deliberately——

The Court: That is right.

Mr. Singer: ——whether he had any of these records, and he said they were all taken by the Government.

The Court: If there are any such records here, they will be produced.

Mr. Singer: That is right.

[fol. 653] By Mr. Singer:

Q. There was a time, was there not, when you were in Washington with Mr. Grunewald?

A. I have been there many times with Mr. Grunewald.

Q. There was a time when your did occupy a room and had charges that were paid by Mr. Grunewald?

A. That was in his suite of rooms.

Q. When was that?

A. That was in 1950.

Q. Was that in connection with certain work that you were doing then for Mr. Grunewald?

A. Yes, it was.

Q. Did it have anything at all to do with the Pattullo case, the Gotham case or any tax case?

A. No, it did not. Oughn't I better state what——

The Court: No, just answer the question. Mr. Singer can ask the questions. You answer them.

The Witness: All right, your Honor.

Q. So far as you know, did Mr. Davis ever talk to you about what happened in the special agent's office in the Pattullo case?

A. When?

Q. After you had received this check for $2500, Exhibit 39.

A. Yes, then of course he told me.

Q. Did he tell you that there had been a hearing?

Mr. O'Hara: Let us find out what he told him.

The Court: Ask him what he told him.

Q. Did he tell you there had been some kind of a hearing?

A. Yes.

Q. Go ahead, tell me, if you want to go into it. Well, tell me this: Was criminal prosecution refused?

A. It was.

Q. Going on now to the check for $3500, Government's Exhibit 39-A in evidence, January 24, 1949, did you receive that check from Mr. Davis (handing)?

A. I did.

Q. Did you have a talk with him about it when you received it?

A. I did.

[fol. 654] Q. What was the conversation?

A. Well, he told me that the matter is over and that he would pay me, he said he would pay me one-third, and I said, "Now that the matter is over, Irving, how about settling my bill, what I am entitled to receive?"

He says, "What do you think you ought to receive?" He says, "We just got a check for $15,000 from our clients."

I said, "Well, give me a third of it."

He says, "Not so fast."

I says, "What do you mean not so fast? That is what you said you were going to give me."

"Well," he says, "we paid Jim Saver $3500."

I says, "When is that? How is that?"

"Well," he says, "you don't think he is working for his health."

I says, "No."

"And we had about a thousand dollars expenses in the Pattullo case, that all comes off the top, the $3500 and the thousand, which leaves $10,500."

And he says, "I will give you a check for $3500."

I says, "All right, let me have a check for $3500 and forget about it."

Q. Did you ever get any other money out of the Pattullo matter?

A. No, sir, I did not.

Q. After that date, January 24, 1949, did you do any further work in the Pattullo matter?

A. Well, about 1950, I think it was the month of January, Irving Davis came to me and he said, "I would like to go to Washington to take something up with the general counsel, with the attorney."

I says, "Why?"

Q. The attorney for whom?

A. The Government. I mean the chief counsel, Internal Revenue. I says, "Why?"

He says there was a decision in the Ninth Circuit Court of Appeals in which a man by the name of Gross in his office had written a memorandum of law. It was the Smith case, and there were other cases too, but the Smith case [fol. 655] in his opinion was on all fours and it was controlling.

He said, "Now, if I could get a decision from the Government or a statement that that Smith case will not go up on appeal, I can have the conferees in New York determine the civil liability"—there was some question I am not familiar with—"and we can save a lot of taxes"—the question of capital gains tax involved, and something about a trust or something. I don't recall it now.

So I said, "Why don't you call up Washington?" No, I says, "Why don't you go down there?"

He says, "I want you to come along with me."

I says, "What for?"

I says, "You are more familiar with this situation. I don't know anything at all about it even."

He says, "Come along. You know your way around Washington."

I says, "I don't know my way around Washington any more than you do." I says, "Why don't you call up Washington and make an appointment?"

He says, "With whom?"

I says, "Well, call up Mr. Oliphant."

Q. Who was Mr. Oliphant?

A. He was the chief counsel at that time of the Internal Revenue Department.

The Court: Did you know him at that time?

The Witness: Your Honor, no, I did not know him on that day.

He says, "No, don't let's call up Washington." He says, "You know, when you call up there, they will give you an appointment in four or five weeks." He says, "Let's take a trip down there and barge in on them."

I said, "All right, I will go along with you."

He says, "You know, if we get any result here, you will be paid for your services." So I went down with him.

To the best of my recollection, Mr. Singer, we registered at the Washington Hotel that day. Now, the next morn- [fol. 656] ing, when we were about to take a cab down to the revenue office, and we were sitting in the Washington Hotel, I think we just came out of the room where we had our breakfast downstairs, the coffee shop, and as I came up and I was walking over, Grunewald runs into me. And he says, "What are you doing in Washington? When did you get here?"

I think I says, "I got here yesterday," meaning at that time.

He says, "How is it you didn't come in to see me?"

I said, "We are here on some business here."

He said, "Why? What kind of business have you got?"

I says, "We are going down to see the chief counsel about a matter." I says, "Meet Mr. Davis, my associate." And that was the first time and only time that Davis met him, and that only took 30 seconds, because he says, "Who do you want to see down there?"

I says, "Well, I would like to see Mr. Oliphant."

He says, "Well, Max, you know Oliphant, don't you?"

I says, "No."

He says, "You met him at the party."

I says, "My heavens, you don't expect me to remember; you had a couple of hundred people there that day." I says, "I don't remember him."

I says, "Well, will you do me a favor, Henry? It is going to save us a lot of time. If you know Charlie Oliphant, call him up. I would like to make this train back to New York, if I can, today. I don't want to stay over here if I can help it."

And he called up. He went into a telephone booth in the lobby and he called up and he said to me, "You can go down there; he will see you."

Davis and I went down there, and when we arrived there—I recall that distinctly—the secretary said, "Mr. Halperin"——

When he phoned, he says, "Mr. Halperin, my attorney, wants to see you."

[fol. 657] Well, when we got down there, the secretary said, "I tried to get you at the office, Mr. Halperin, to delay the appointment for an hour because Mr. Oliphant is with the Commissioner."

"Well," I says, "that is perfectly all right; we will wait around."

So we went downstairs and walked around. We sat on the benches in the park there. When the time was up, we went in to see Mr. Oliphant.

We introduced ourselves. I said, "I am Mr. Halperin; this is Mr. Davis."

He says, "Yes, I know," and he says, "What can I do for you, Mr. Halperin?"

I says, "Well, Mr. Davis will do the talking."

So Mr. Davis explained the situation to Mr. Oliphant, and Mr. Oliphant says, "I surely don't know a thing about the Smith case, but I will tell you, I will call in one of my assistants" and he did. Whoever that man was, of course, I can't recall now. That is in that memorandum, too.

We spent a little time with this gentleman, who was very gracious and very patient, and he got the Smith file out and he said, "I think the Smith decision is very, very bad law, and we certainly intend to take an appeal because there are any number of cases that depend—that decision could affect any number of other cases."

So we left and we thanked him.

Q. And that was the end of that situation?

A. That was the end of that situation, yes; sir.

Q. Do you remember when Davis was on the witness stand, Irving Davis, I asked him if he had met this lawyer, William Davis? Do you remember that?

A. Yes, sir.

Q. Will you tell me about that incident and where that occurred and what it was about.

A. When we were in Washington, Davis asked me to call up this William Davis. Whether it was before we saw Oliphant, or after we saw Oliphant, I certainly cannot remember. And I don't know whether he wanted to discuss the [fol. 658] Smith decision with him. So Mr. Bill Davis said that he intends to be in Newark in the next few days, that he has a tax matter there, that he is going to stop at the Military Hotel, and he would be very, very happy to see me and Mr. Irving Davis.

I think I told him, "When you have your leisure time, when you get through with this matter, give us a ring, or give me sufficient notice so that I can get Mr. Irving Davis and we have enough time to go over," although it only takes twenty minutes to get to Newark.

I think he phoned and we met Mr. Bill Davis at the Military Hotel. I am quite sure we had lunch there. I know Mr. Davis testified that we were only there a very short time, 15 or 20 minutes, but we were there much longer than that. He discussed the Pattullo case with Mr. Davis. That was the end of that meeting, to the best of my recollection.

Q. Returning to Mr. William Davis or Bill, as you call him, when you say you went to Washington in 1948 and you talked to Bill Davis, did you mention the name of the case in which you were seeking information to him about the voluntary disclosure?

A. No, I did not.

Q. I can't hear you.

A. No, it was hypothetical, I am sure. I didn't want to disclose—I wasn't authorized really to disclose the case.

Q. In 1947, when you saw Mr. William Davis, where did you see him?

A. You don't mean 1947.

Q. In 1948, I mean.

A. I saw him at his home.

Q. Where was that?

A. In Washington, D. C.

Q. Did you get paid at all for making this trip to Washington in connection with this Smith case decision?

A. No, I didn't.

Q. Tell me, Mr. Halperin, right up until the time when you went to Washington and after you came back, after your talk with the assistant to Mr. Oliphant, did you know that anybody had paid $100,000 or any sum of money to bribe or fix anybody in the Pattullo case?

A. I certainly did not. I know I found that out very much later.

[fol. 659] Q. That there was talk about it?

A. Oh, yes. I never knew about it.

Q. Did you ever have any agreement with anyone to make a connection to help, even help, them in this Pattullo case?

A. I did not, Mr. Singer.

Q. Did you, yourself, do anything that was illegal—and you ought to know what is illegal at this stage of your life—in connection with the Pattullo case?

A. I did not.

Q. As far as you can tell even right up to today?

A. Yes, sir, even right up to today, I did not.

Q. Before I go any further on the next subject, is there anything else about this Pattullo case that you haven't told us that you can remember at this time?

A. Well, except, Mr. Singer, subsequent events.

Q. No, we are not talking about that.

Now, there has been talk here that $16,000 or $20,000 was received by Davis from Pattullo, and Davis claims he paid it to Mr. Schwaeber or Mr. Saver or to somebody in connection with an additional fee. Were you told anything about that?

A. Never.

Q. Did you hear anything like that in 1949?
A. Never heard about it in 1949 or any other time.

* * * * * *

Q. Did Davis ever say to you that he had paid Scherm $40,000 or $40, or any sum of money?
A. He never did.
Q. Look at this man, Harry Scherm (indicating). Did you ever meet him in your life until this case started?
A. Not until I met him in the courtroom.
Q. Did you ever have any conversation with him whatever about any subject?
A. No, sir, I did not.

The Court: Did you ever see him in the office there?

The Witness: No, sir, I never saw him in the office.

[fol. 660]. Q. Take Mr. Steinberg (indicating). Have you ever seen him?

A. I never saw Mr. Steinberg until I met him in this courtroom.
Q. Did you ever hear Mr. Steinberg's or Mr. Scherm's name discussed by Davis, Hoffman or Schopick or Smith or anybody else in your presence?
A. I did not.
Q. During the time this Pattullo matter was going on in your office?
A. No, sir, there was no discussion about Steinberg or Scherm.
Q. Take Mr. Bolich (indicating). Did you ever meet Mr. Bolich?
A. I never met Mr. Bolich until I met him in this courtroom.
Q. Did you ever have any conference with him on Pattullo, the Gotham, Berman or any other tax matter?
A. I never spoke to Mr. Bolich.
Q. You were in Washington?
A. Yes, sir.
Q. Certainly some time during 1948 and 1949.
A. Yes, sir.
Q. There is testimony here that Mr. Bolich occupied a bedroom in a suite that was charged either to Mr. Wood

ring or to Mr. Grunewald. Did you ever meet Mr. Bolich in that suite where Mr. Grunewald had his office?

A. I never met Mr. Bolich in Mr. Grunewald's suite.

Q. Did you ever ask Mr. Grunewald to telephone Mr. Bolich in your behalf or to communicate with him directly or indirectly, in your behalf, for yourself, for a client or for any matter whatever?

A. I never did.

Q. Now, there was a time when you were in Washington, as you said, in 1950?

A. Yes, sir.

Mr. Singer: May I have those bills that were offered here?

Q. Now, I show you Government's Exhibit 71 in evidence (handing). I show you the first one on top, June 19, 1950? Is that your signature?

A. Yes, sir.

Q. July 10, 1950—is that your signature?

A. Yes, sir.

Q. July 17, 1950—is that your signature?

A. Yes, sir.

Q. July 20, 1950—is that your signature?

A. Yes, sir.

[fol. 661] Q. July 25, 1950—is that your signature?

A. Yes, sir.

Q. August 28, 1950—is that your signature?

A. Yes, sir.

Q. Now, there is a charge here on August 22, 1950, and there is no card for it. Do you know whether you were in the Washington Hotel on August 22nd?

A. Well, if my name is on there.

Q. Again, it seems to me Max Halperin, without the "in". Do you know about this at all?

A. I do not.

Mr. Singer: And that is the one that bears the date of August 22, 1950.

Now, may I have the records which show when Mr. Bolich left the suite of Mr. Grunewald?

Mr. MacMahon: Your Honor, if Mr. Singer will refer to any exhibit, we will be glad to furnish it.

Mr. Singer: Sure; We looked it over yesterday.

The Court: All right, you get the ones you looked over yesterday. Which ones do you want? The bills for Mr. Grunewald's suite occupied by Mr. Grunewald, or the bills rendered to Mr. Bolich?

Mr. Singer: No, he knows the ones I mean.

I want a comparison made, your Honor, between Exhibit 63, which shows that on June 22, 1950, a room rate was charged to Mr. Bolich directly, which would indicate that he now occupied a room——

Mr. MacMahon: Your Honor, I object to this summation.

The Court: This is a matter for argument.

Mr. Singer: Now, wait a minute, this is not a matter of argument.

Mr. MacMahon: Your Honor, I submit it is. This is a time for questions.

Mr. Singer: You may say that it is, but I intend to read from this exhibit.

Mr. MacMahon: Your Honor, the exhibit is not in evidence.

Mr. Singer: You know, you keep—well, if it isn't, then I am sorry. Why give it to me? Let us not [fol. 662] argue about it. If you don't want me to have it, I don't care about it.

The Court: You can get it all right.

Mr. Singer: It doesn't bother me at all.

Mr. MacMahon: You can have it.

Mr. Singer: If it is not in evidence, I am not entitled to it, according to somebody's ruling.

Mr. Aranow: May I state the reason it was not put in evidence is that it was conceded on June 22, 1950, Mr. Bolich was out of that suite and took another room.

The Court: Where was it conceded?

Mr. Aranow: On the record.

Mr. Singer: On the record in this trial.

The Court: Then let us not argue about it.

Mr. Singer: That is where we get all the conversation.

The Court: If you have a concession on the record, you don't need anything further.

By Mr. Singer:

Q. These visits which appear on Exhibit 71 in evidence, in June and July and August, 1950—I am pulling out the one of August 23, 1951—will you look at those, please (handing)? At that time, were you in Washington doing any specific work in connection with the Pattullo or Gotham matter?

A. No, certainly not.

Q. What were you doing in Washington then? Were you doing any work for any particular person?

A. Well, I think that I was doing work for the Hegeman Harris Construction Company.

Q. What is the Hegeman Harris Company?

A. Hegeman Harris Company is a very large construction company that have been in business for a great many years and have built some of the finest——

Q. Just, they are a construction company?

[fol. 663] The Court: No commercials; just tell us what it is.

Mr. Singer: We have enough problems of our own in this case.

A. (Continuing) It is a very large construction company.

Q. In connection with that company did you subsequently prepare an agreement?

A. I think that was in 1951, but I have had negotiations with Mr. Grunewald for probably over a year on that, a year and a half.

Q. And did those negotiations finally, ultimately result in a drawing of a written contract?

A. Yes, they did.

The Court: Whom were you representing in that?

The Witness: Well, I was to be paid by the Hegeman Harris Company on a fee basis. I mean, I was to get—I had some letter written that I was to get five per cent. They were doing business on a fee basis. That is, negotiation work. They never bid on contracts.

The Court: You were representing them in the carrying on of negotiations with Grunewald?

The Witness: Yes.

The Court: I just wanted to get the facts.

The Witness: Yes, I would say that.

Q. There was an agreement actually signed?

A. There was a written agreement signed between Mr. Grunewald and the Hegeman Harris Corporation.

Q. Now, in addition to that——

The Court: We have just about come to our adjournment period.

Mr. Singer: Would you just let me finish this.

The Court: Yes.

Mr. Singer: I would like to get through with this.

Q. Now, did you ever with another lawyer make an appearance—don't tell me where it was and when it was— [fol. 664] for Mr. Grunewald in connection with some legal proceeding?

A. Well, I assisted Mr. William Power Maloney in a matter.

Q. Don't tell me where it was——

The Court: Did you make an appearance with some other lawyer?

The Witness: Well, I didn't really make an appearance. I was doing some work with him. He was counsel in the matter.

The Court: You were helping Mr. Grunewald's counsel?

The Witness: Yes.

The Court: That is enough.

The Witness: Yes, I was. All right.

The Court: You had better fix the time.

Q. Will you fix the time?

A. I think that was in 1950. Sometime, I think it was, in the latter part of 1950.

Q. In connection with this work that you were doing with Mr. Maloney for Mr. Grunewald, legal work—

A. Yes.

Q. —did you spend some time in Washington?

A. Oh, just a little while, yes.

Q. Several days?

A. Yes, about several days.

* * * * * *

Q. Mr. Halperin, let us go back to the summer of 1948, and I direct your attention specifically to what we called the Gotham Beef case here in court of Mr. Berman. Do you remember when you first heard of that matter?

A. To the best of my recollection, I first heard of that around August I believe of 1948.

Mr. Singer: May I have Government's Exhibits 17, 18, 19, 20, 21, 22, 23, please?

Q. I show you Government's Exhibit 18, which is a power of attorney and bears the date August 3, 1948 (handing). [fol. 665] Have you ever seen that power of attorney?

A. I have not.

Q. Do you know whether that power of attorney was executed before this Gotham Beef matter was discussed with you?

A. I believe it was.

Q. So that you would fix this conversation, your first hearing of the matter, after August 3rd?

A. I would, yes.

Q. I show you Government's Exhibit 23, which is a contingent fee statement. I think there are, if my memory serves me, four (handing). Have you ever seen those before this trial?

A. I did not.

Q. Tell me when you first heard about this Gotham Beef matter. Where were you?

A. In my office.

Q. Who told it to you?

A. Mr. Davis.

Q. Would you tell me what he said?

A. Well, in substance he said to me, "Max, you made a very good impression on Mr. Marks, and as a result of that, we really held on to the case. Now, I have another matter that I would like to have you go down and see the people."

I said, "What matter is that?"

He said it is a case that Leo Greenstein recommended to him.

I says, "What do you want me to do?"

He says, "Well, I have had several conferences with the

people down at 61 Broadway." I think he mentioned their names—Mr. Berman and Mr. Tobias.

"I would like to have you go down and speak to them."

He said, "There is some lawyer appeared in the case, he was not on the ball, and he botched it up, and I believe that if he had put the work in, the matter could have been disposed of favorably." And he says, "Go down and see these people and have a talk with them and question them," and I did go down and I met Mr. Berman and I met Mr. Tobias.

Q. Did you go down alone or was there anybody with you?

A. I went down alone, but Mr. Davis was there.

[fol. 666] Q. You met him down there?

A. I met him down there, yes, sir.

Q. When you got down there or before you got down there, had there been any mention of special agent's office or appointments or anything like that?

A. I think there was some reference made that Davis had an appointment with the special agent or a squad leader in the revenue office to discuss the matter.

Q. Do you know in what revenue office or where they were?

A. 253 Broadway in the special agent's office.

Q. Where did you say this was?

A. 61 Broadway.

Q. When you got down there, whom did you meet?

A. I met Mr. Berman.

Q. Which Mr. Berman?

A. Louis Berman.

Q. That is the man who was a witness here?

A. The man who was a witness here.

Q. Go on.

A. And Mr. Monroe Tobias.

Q. And you said Mr. Davis was there?

A. Mr. Davis was there.

Q. Did you have a talk about the matter?

A. Yes, I had a talk about the matter. He wanted an opinion from me, and I had a talk with him, and I asked Mr. Berman whether they owed any money to the Government and he said no.

I says, "Can you account for the income that you didn't disclose in your returns?"

And he says, "I could."

I says, "How can you account for it?"

He said, "Well, every dollar I didn't disclose or report in my income tax returns I paid out in cash for the black market ceiling prices, and I never retained any of that money."

So I said to Mr. Berman and Mr. Tobias, "Now, look here, have you got any proof?" I says, "If you go down—the special agent's office and make statements that you can't substantiate, you are only going to get yourself in a worse jam than you are in now" because I was told that as a result of what happened before Davis got into the case, [fol. 667] there was going to be a recommendation for a criminal prosecution.

Now, I says, "On the other hand, if you have any documentary evidentiary evidence that we can substantiate in some fashion that you did make these cash payments over the ceiling prices in order to get the meat, and we can introduce that evidence, I think you have a very excellent chance to convince the special agent or the conferee, who is going to pass on it, that the Government has no case to prosecute."

Q. Now, what happened after that?

A. Well, they said that they have the proof and they will present the proof. There was some discussion then about a fee. There was to be a $5,000 fee, and there was some talk about putting up another fee for another lawyer who was not to appear in the matter.

Q. Was the amount of money discussed?

A. The amount of money was not discussed outside of the $5,000 fee.

Q. You talk about this other money. When I said was the amount discussed, was there discussed any way that that money was to be put up, cash, check or anything like that?

A. That money was to be put up in escrow. It was to be cash.

Q. What happened after that?

A. Well, we left the office and I had a talk with Davis on the way uptown to our office and I says, "Irving, what is this Bunk about having another lawyer in the case? It seems to me from what we heard that there is certainly no necessity of having any other lawyer in the matter."

He says, "Well, Greenstein, Tobias and myself agreed on that."

I says, "Who is the lawyer?"

"Well," he says, "you don't know him."

And I said to David, "Well, why did Tobias get so excited in the office when you spoke about the other lawyer and about a cash fee?"

[fol. 668] He says, "That was an act on the part of Mr. Tobias. You will find that out in the next few days."

He says, "After we left, Tobias and Berman will have a talk about the matter and in the next few days, I'll get a call to go ahead with the matter," and he was absolutely right. He told me, after three or four days elapsed, that Mr. Berman had telephoned him and instructed Davis to go ahead with the matter. Do you want me to continue?

Q. No. Was there any discussion then about your fee?

A. I beg your pardon?

Q. Was there any discussion then about your fee?

A. Yes. I was to get 40 per cent of the fee of $5,000.

Q. Did you have a talk about that?

A. Certainly we had a talk about it, yes.

Q. And did you ever talk about the fee, the cash fee, to the other lawyer?

A. I had no interest in that, Mr. Singer, except that they wanted to make arrangements to have the money deposited in escrow, and Greenstein was to represent Berman and Tobias.

Q. Were you there when that was agreed on?

A. No, I wasn't there when that was agreed on.

Q. How do you know that?

A. Mr. Davis told me, and he wanted me to represent him. They were talking about opening a vault, and he wanted me to become escrowee and sign the card to have the vault opened in both our names, Greenstein and myself, and I objected to it. I said, "Let Greenstein open the vault

and I will act as deputy to have access to the vault," and that was finally agreed upon. Subsequently——

Q. Was there anything said about the keys to the vault?

A. Oh, yes. The keys were to be held by Greenstein; both keys.

Q. Now, was there a time when you were at the office and Mr. Berman, Mr. Davis, Mr. Tobias and Mr. Greenstein were there?

A. Yes.

Q. At your office?

A. At Mr. Davis' room, yes.

[fol. 669] Q. Now, tell me what happened. Do you remember when that was—or, just a minute.

Mr. Singer: May I have Exhibits H, I and J?

(Papers handed to Mr. Singer.)

Q. Now, I show you Defendants' Exhibit J, which is a Trade Bank Safe Deposit Company record which bears date September 15, 1948. Does that refresh your recollection?

A. It does.

Q. As to the date when this incident occurred at the office of Mr. Davis and you, Berman and the others were there?

A. The date was September 15th.

The Court: 1949?

The Witness: 1948, your Honor.

Q. And what happened at that time?

A. Well, Greenstein, Tobias, Berman and Davis, and part of the time I was in the room, when there was a package of money turned over to Mr. Greenstein——

Q. Go ahead.

A. And Mr. Greenstein asked me to go over to the Trade Bank on 48th Street, I think. He suggested the bank there because he knew the officers; he had an account there himself; he had done some work for the bank.

"Well," I said, "it is all right with me. We will go anywhere you suggest."

So we went over to the bank and I insisted that he take the name out—the vault in his own name and that I was to be deputized. He opened the vault.

Q. Was the vault opened?

A. The vault was opened.

Q. Was there a receipt issued?

A. The receipt was issued to Mr. Greenstein, and I took the receipt.

Q. Where is that receipt?

A. This is the receipt (indicating).

Q. Defendants' Exhibit J?

A. Yes, this is the receipt.

[fol. 670] Q. Go ahead.

A. The receipt was issued to Greenstein. I don't know how the address 535 Fifth Avenue appeared on that, but it was issued to him. He paid the cash for it and the vault was opened. To the best of my recollection the agreement between the vault company and Leo Greenstein was that I was to be deputized. The package was put in the vault. Mr. Greenstein put the package in the vault.

Q. Let us stop at this point. There was money in that package?

A. Undoubtedly there was money in that package.

Q. Cash money?

A. There was cash money in that package.

Q. Do you know how much there was?

A. I do not know how much money was in that package, no, sir.

Q. Did it seem like a substantial sum?

A. Well, it was a pretty fair-sized package, yes. Of course, it all depends on what the denominations were of the bills.

Q. Now, what happened after the vault was opened?

A. After the vault was opened we left and we went over to the office of Davis——

Q. Just a moment. What happened with the package?

A. It was put in the box and closed and the two keys that were issued Greenstein retained, and we went to the office and Davis was there and I told Davis in the presence of Greenstein what happened. I said, "Irving, we opened the vault. Greenstein has the key. I will take no responsibility, further responsibility for this money. I want you to know that, that the keys are not in my possession and I don't want any possession of the—one key or either one of them or both keys."

He said, "That is perfectly all right."

Q. Now, let me ask you a question. Mr. Davis has testified here that on some subsequent date, he wasn't sure of it, he gave you another package of money, cash. Did anything like that happen?

A. Never happened. No, sir. Never happened.

Q. Did you ever return to this box?

A. I did not.

[fol. 71] Q. Did you ever put anything else into it?

A. I did not.

Q. Did you ever take anything out?

A. I did not. I didn't have the key. I couldn't even if I wanted to.

Q. Did you ever see this package again?

A. I did not, sir.

Q. Now, let us go back to the Gotham case itself. Did you have any discussion with either Mr. Berman or Mr. Tobias, or anyone else, about the Gotham case?

A. Yes. After Mr. Davis, I think, had some meeting down at the special agents' office we got together to examine certain records. I examined testimony, the transcript, the questions and answers that were given by Berman to Mullenbach.

Q. Which Berman?

A. Louis Berman.

Q. Go ahead.

A. We went over these questions and answers carefully. They produced certain memoranda and checks. I had a long talk with Philip Berman.

Q. May I show you this paper, Defendants' Exhibit E, which has a letter, an accompanying letter, bearing the date September 10, 1948. Did you see the papers which accompanied that letter?

A. Yes, I believe I did.

Q. Did you see them before they were submitted?

A. Yes.

Q. Now, there was offered in evidence here a letter from a Dr. Kraus.

Mr. Singer: Could I have that, please, Exhibit L?

(Paper handed to Mr. Singer.)

Q. I show you Exhibit L, which is a letter bearing date July 23, 1948. Did you see that letter before it was submitted?

A. I did, yes, sir.

Q. Now, to go back, did you see Mr. Philip Berman?

A. Oh, yes. I had quite a long talk with Mr. Philip Berman. He reportedly——

By the Court:

Q. Just answer the question. The question was——

A. Yes, sir.

[fol. 672] By Mr. Singer:

Q. Now, I am not interested in all the details of your talk with him, and I am going to ask you your opinion: When you got through talking with him did you find you were able to understand what he was saying to you?

A. Not a word.

Q. Did you make up your mind that he wasn't rational?

A. Well, the poor man was really irresponsible, he certainly, any layman would know that he didn't know what he was talking about. He didn't answer questions responsively. He told me he had been going to a psychiatrist for quite a long time.

Q. Now, did you discuss this question of whether he was rational or irrational with any of the other people? That is, Davis, Tobias?

A. Yes, there was a discussion. I told them about the interview I had with him and he certainly could be of no benefit to Louis Berman himself or anybody else, and I think we ought to get some medical proof as to his irresponsibility, from a medical standpoint.

Q. That letter is dated sometime in July. Did you have that letter before you saw Mr. Berman or did you see that letter before you saw Philip Berman?

A. I don't believe I had that letter. I was asking them to get more specific reports from the psychiatrist, a medical report, but I don't think we got anything outside of this letter.

Q. Now, how many conferences did you have on the actual fact side of this situation?

A. Oh. I think we had a number of conferences. We had

a number of conferences with Louis Berman. I went down to the office at 61 Broadway and had conferences with Monroe Tobias and Louis Berman.

Q. How much time would you say you put in on this matter?

A. I think I put in a considerable amount of time. We had discussions in the office among ourselves. I think that Irving Davis prepared some memorandum of the facts, and I was with him when that was done and made suggestions [fol. 673] and so forth. I mean, it wasn't a legal brief; it was a review, an argument that there was no basis for criminal prosecution.

Q. Now, subsequently did you go to the office of the special agent at the hearing?

A. No, I did not.

Q. Now then, there came a time when according to Exhibit 19, on October 29, 1948, there was a bill for $5,000 rendered by Schopick & Davis to Berman?

A. Yes, sir.

Q. Is that correct?

A. That is correct.

Q. Now, did you know that that bill was being sent out?

A. Well, I knew that they were expecting to receive a check. I don't know just when the bill went out, no.

Q. Here is a check dated October 30, 1948, Exhibit 20, $2,500, from Louis Berman to Schopick & Davis. Did you know that that check was received in the office?

A. I did not.

Q. Did there come a time when you received payment of your portion of this fee?

A. I think some time in November. I don't recall. My checkbook would show the exact date.

Q. I show you this check, Exhibit 41 (handing). Did you receive that check from Schopick & Davis?

A. I did, yes, sir.

Q. How much is that check and what is the date?

A. $1,760 on December 9th.

Q. 1948?

A. 1948, yes, sir.

Q. What was that check for?

A. That was for my services. It was 40 per cent of what he claimed was the net fee. He received $5,000, and he told me that he had disbursements of $600, which included a payment to Greenstein and some incidental disbursements. So he took the $600 off, which left $4,400, and 40 per cent of that would amount to $1,760.

Q. Now, did you have any talk with him then about this cash fee?

A. Yes, I did.

Q. What did he say to you and what did you say to him about it?

A. He says, "What are you asking about that?"

[fol. 674] Before that I spoke to him about the $600 to Greenstein. I says, "Do you mean to tell me, Irving, that Greenstein is getting less than $600 for recommending a case where your fee is $5,000, and where a sum in cash, a substantial sum in cash, was deposited in escrow?"

He says, "Don't worry about that. That was agreed between Tobias, Greenstein and myself. There really was a lawyer in it and we are paying him off."

And he said, "Don't you concern yourself about it. You got paid for your services and you ought to be satisfied."

Q. Mr. Hoffman has testified in substance some time in 1948—I think he said it was in the summer—that he had a talk with you and that you said in substance, or he asked you to go down and try to renew your acquaintanceship with Mr. Grunewald. Did you ever have such conversation?

A. I never had such conversation.

Q. Is it a fact that you were on unfriendly terms with Mr. Grunewald in 1948?

A. I never was on unfriendly terms with Mr. Grunewald from the day I met him until the present time.

Q. Mr. Hoffman has also testified that you went down to Washington with him, where you went to the Washington Hotel, and I don't know whether it was in relation to this or some other matter; that he went upstairs with you into a room where Mr. Grunewald was. Did any such thing occur?

A. It never occurred and never took place.

Q. Now, Mr. Hoffman also testified that you came back and told him or that you told him in Washington or on the way back that you had had a talk with Mr. Grunewald about

the Gotham or Berman matter, and that you had reported to Mr. Hoffman that Grunewald had made some call over the telephone to someone and said, "This is Captain Henry, put a red flag or red light or a red signal on something." Did any such conversation take place?

A. I did not report anything like that and no such event took place.

Q. Now, Mr. Hoffman or Mr. Davis also testified that some time in October, November or December of 1948, you [fol. 675] told them in substance that you had taken the money out of the box, $60,000, I think they said, and were taking it down to give it to Mr. Grunewald. Did any such occur?

A. No such thing occurred.

Q. Did you give Mr. Grunewald any money out of any box?

A. I didn't give him 60,000 or $60 or 60 cents. He never had any knowledge about the Gotham case——

Q. So far as you know?

A. ——or any other case. I beg your pardon?

Q. So far as you know?

A. So far as I know, yes.

Q. Did you ever discuss the Gotham case with Mr. Grunewald?

A. I never discussed the Gotham case with him, no sir.

Q. Do you remember now an incident which occurred in 1951, some time in August 1951, in the office of Schopick & Davis?

A. Yes, I do very clearly.

Q. Will you tell me about it?

A. Well, the date was August 15, 1951.

Q. Go ahead.

A. Mr. Davis had about seven clients in his office, and he was closing a real estate deal. I was not in the office at that time, but I came in and the people were still there. He was not there, and I asked the secretary, "Where is Mr. Davis?" And she told me that he received a very imperative call from the Pattullo Modes people——

Q. Don't tell me what she said, but tell me what happened later.

A. Well, he received a call.

Q. Did you see Mr. Davis later?

A. I saw Mr. Davis about 5:30, and he asked me to wait, and he said he would like to drive me home, so about 6 o'clock we left the office. On the way up he said, "I had one of the worst days of my life today."

I says, "You do look very much perturbed. What happened, Irving?"

"Well," he said, "I received a call from the Pattullo people to come right down there."

[fol. 676] When he came down, Mrs. Marjorie Segel told him that there was a representative of one of the attorneys for the King Committee, who had interviewed her and that she had told him—he asked her about a voluntary disclosure, whether they ever made a voluntary disclosure, and she answered in the negative, and he said, "I can't understand that, for her to make that kind of a statement. She is going to get Smith in trouble."

And he says, "that is going to start trouble."

I says, "Well, Irving, was there a genuine voluntary disclosure?" I says, "What are you worried about?"

He says, "Yes." Well he says, "When the client gets in trouble, they are going to blame the lawyer for it."

I says, "Well, if you didn't do anything wrong, you don't have to worry about it."

And I asked him several times whether there was a voluntary disclosure.

"Well," he says, "you know. You discussed that with Mr. Marks when I gave you that memorandum before you went to Washington." He says, "I believe you discussed it with Mrs. Marjorie Segel."

"Well," I says, "frankly speaking, I did not recall it, but now that you call my attention to it, I do recall that I did mention the voluntary disclosure to Marjorie Segel some time in 1948."

Q. Was there anything further done on that situation? Did you have any further talk with him?

A. On that situation?

Q. Yes.

A. At that time?

Q. That is right.

A. No, I did not.

The Court: I think at this time we might take our morning recess, if that is all right.

Mr. Singer: Oh, yes. I had not been watching the clock.

(Short recess.)

[fol. 677] By Mr. Singer:

Q. Now, Mr. Halperin, I will direct your attention to some testimony concerning Clover.

Mr. Singer: May I have Exhibits 44, 45, 46, 47 and 48?

Q. (Continuing) Now, I show you these Exhibits 45 to 48 inclusive. First look at the two powers of attorney, which are Exhibits 45 and 46 and bear date July 26, 1950 (handing). Is that correct?

A. That is correct, yes, sir.

Q. You will notice a letter, Exhibit 47, bearing date July 26, 1950, which has been properly called a contingent fee statement. Is that correct?

A. Yes.

Q. First, is that your signature on Exhibit 47?

A. Yes, sir, it is my signature.

Q. That is the contingent fee statement?

A. Yes.

Q. Now, I show you this paper, Government's Exhibit 48 (handing). There is some handwriting, Max Halperin. Is that your signature?

A. That is my signature, yes.

Q. I show you this check, dated June 28 (handing). Have you ever seen that check before?

A. I have never seen this check before.

The Court: Who is the check from?

Mr. Singer: May I identify it? It is a check to Schopick & Davis from Clover Foundations in the sum of $2,500.

Q. I note that the check is dated June 28, 1950 and cleared the bank on June 30, 1950, approximately a month before the powers of attorney or contingent statements were signed?

A. Yes, sir.

Q. Did you know about the Clover matter when this check of $2,500, Government's Exhibit 44, was received by Schopick & Davis?

A. I did not.

Q. Did you know whether they had received any fee at all in the Clover Foundations matter?

A. I did not.

[fol. 678] Q. I see that on July 26, 1950, there was a power of attorney signed by Mr. Glover and Mrs. Glover, and on the same day you signed a contingent fee arrangement, and so did Mr. Schopick and Mr. Davis. Is that correct?

A. That is correct.

Q. Now, do these three papers, Exhibits 46, 45 and 47, help you in any way fix the date and the place, if it can, where you first saw Glover (handing)?

A. I think it was after the dates here.

Q. You mean you signed that contingent statement before you saw the client?

A. Oh, no. I am talking about the powers.

Q. Well, the powers and the contingent statement are all dated the same day?

A. Yes—no, I saw them shortly before that.

Q. Now, tell me, there was a man whose name was Greenberg, an accountant, who testified in this case. Do you have any recollection of being at Mr. Greenberg's office? I don't remember where he said it was.

A. 350 Broadway, I think.

Q. Do you have any recollection of being at his office?

A. No, I have no recollection of being at his office, and as a matter of fact I had no recollection of Mr. Greenberg until he appeared here on the witness stand. Then I recalled that Mr. Greenberg was present, and to the best of my recollection he was present at the office of Schopick & Davis.

Q. Now, was he present with Mr. and Mrs. Glover?

A. Yes, sir.

Q. And were you there?

A. I was, yes.

Q. You fixed the time some time around July 26?

A. Yes. I would say it was the latter part of July. I would have no recollection except for these papers here that refresh my recollection.

Q. Now, was there a conference at the office of Mr. Davis when Glover and Mrs. Glover were present?

A. Yes. You mean in my presence?

Q. Yes, that is right.

A. Yes, there was a conference.

[fol. 679] Q. Now, do you remember what the discussion was about?

A. Well, we went into the office and it appeared that Mr. Glover was represented by a lawyer who at the time we were speaking about him had been disbarred and was indicted, I believe, on a charge of grand larceny. That is what I was told. And that he relied on the good faith——

Q. By "he," whom do you mean?

A. I mean Mr. Glover and Mrs. Glover. I think they were in business together. His wife and Mr. Glover, that he relied on the advice and good faith of his lawyer, and the question came up whether he had any kind of a defense, and Mr. Davis asked me for my opinion. It certainly wasn't a question—it wasn't a question of tax law, but I said to Mr. Davis, I do know that much, that the element of intent was one of the ingredients that a man has committed a crime, and if there was no intent, and that he relied on his attorney and that he acted in the best of faith and good faith, that I thought as far as any criminal prosecution was concerned, that he could escape criminal prosecution.

Q. Now, was there any talk about fee?

A. Oh, yes, there was a talk about fee. Mr. Davis said to Mr. Glover and Mrs. Glover that he ought to receive one-third of any fees that he would save them in taxes, and Mr. Glover who I recall was not a young man—I think he was, well, I would judge he was in his 70's or 70 or thereabouts or probably a little younger, but he was a very nervous type of man, and when Davis mentioned a large sum of money, I think it was $150,000 or $200,000 if he saved him the tax liability and prevented a criminal prosecution, the man became terribly excited, and Mrs. Glover, who—my impression that I got was that she was the dominating force as far as Mr. Glover and the business was concerned—Mr. Hoffman got her in a corner, took her out of the room and brought her into the small room that I occupied, and then he came back with her and he whispered to Davis, what they were talking about I didn't know, and they tried to get this man not to be excited, and the conversation continued for a while, and that was the first time, [fol. 680] at that meeting, that I knew that they had already been retained in the case or had received that check

for a retainer, and when I saw the man get so excited I said to Irving, "Why don't you give the man, why don't you return the check and forget about the case? He is going to be a very difficult problem. He blames lawyers, he blames everyone. Just forget about it," and I walked out of the room.

Q. Then several days later on August 3, from Exhibit 48, you withdrew from the matter?

Mr. O'Hara: Your Honor, I don't think this witness needs any leading.

The Court: No, I think——

Mr. Singer: That is in evidence.

The Court: That letter is in evidence.

Mr. Singer: That is right.

The Witness: Yes.

Mr. Singer: This letter was written. It is in evidence. The Government offered it.

Q. Exhibit 48. Is that right?

A. Yes, sir.

Q. August 3rd.

A. Yes, sir, I withdrew. Mr. Davis asked me to sign the letter. As a matter of fact, I didn't know that I was on the power of attorney.

The Court: You didn't?

The Witness: No, I mean at that time, I am saying.

The Court: Yes, but you signed the contingent fee, and you didn't know you were on the power of attorney?

The Witness: For the moment I didn't remember that I was on the power.

The Court: Oh, at that moment.

The Witness: Yes, at the moment.

The Court: All right.

Mr. Singer: Now, I will just read the letter, August 3rd——

[fol. 681] The Witness: I knew I was on the power.

The Court: But you knew you were retained in the case.

The Witness: Certainly.

(Mr. Singer reads Exhibit 48 to the jury.)

Q. I. D., I assume is Irving Davis?

A. Isidore Davis.

Q. So, from July 26th, which is the power of attorney —is that right?

A. Yes.

Q. It was about a week later according to the exhibit, you withdrew from the matter, right?

A. Yes, sir.

Q. Now, did you receive any part of any fee from Mr. Glover or Mrs. Glover, or anything that Schopick & Davis got from the Glovers?

A. No, I did not, and they returned the fee, too.

Q. Now, did you have any conversation with the Glovers about being able to go to Washington or anywhere else and to accomplish any result for them?

A. Nothing like that was mentioned at that conference. The only discussion was about their former attorney.

Q. Now, this contingent fee arrangement, where you made the statement that there was no contingent fee: that was before the conference, was it?

A. Yes.

Q. At that time, as far as you know there hadn't been any contingency, had there?

A. No, as far as I know. No, as far as I know I didn't even know that they had any previous conference.

Q. Now, have you ever seen the Glovers since that time?

A. I did not.

Q. Now, may I direct your attention to some time late in 1951 or early in 1952. Do you remember Mr. Berman testifying that sometime—maybe I am wrong—he said it was in March, 1952, that you called him in, wanted to see him down in his office? Do you remember any such incident?

A. I didn't call him, but I do remember the incident when he called me.

[fol. 682] Q. Did you go down to his office?

A. I went down to his office pursuant to that telephone communication, telephone call.

Q. Where was his office then?

A. 61 Broadway. He had an office with Merdinger & Company.

Q. Merdinger & Company is the firm with which Tobias——

A. Was a member, yes, sir, certified public accountants.

Q. Now, did you have a talk with Mr. Berman that day?

A. With Mr. Louis Berman I had a talk that day.

Q. Was Mr. Tobias present?

A. Not at that time. I spoke to Mr. Tobias later.

Q. I copied it out. I am quoting from page 12. "Q. And did you thereafter see Halperin?" "A. Yes, I saw Mr. Halperin"—well, before I read it, I would rather you tell me, you give me your own recollection of this conversation you say you had with Mr. Berman.

A. I went down to see Mr. Berman pursuant to this telephone call and I met him, and Mr. Berman said to me, "Davis was down to see me yesterday." He says, "Did you know that?"

I said, "No, I am not on speaking terms with Mr. Davis. I had a serious fight with him."

"Well," he says, "Davis was here and he told me that he was endeavoring to make a deal with the United States District Attorney in the Eastern District for immunity for himself and his partner"; that he wanted him to back him up by stating that this money, $60,000, and that is the first time that I heard it was $60,000, and I told that to Mr. Berman, that I had never known how much cash was really involved in that package, and he said he wanted him to back him up by stating that he had paid the money not as a fee, that he was going to testify——

Q. Who was "he?"

A. Davis, that he was going to testify in the Pattullo case and that he would have to mention the Gotham case. He said, "Now, you know, Mr. Halperin, no such thing [fol. 683] took place. You know that I gave that money for a fee and that I wouldn't do anything wrong."

I said, "Yes, I know that was the conversation."

And he stated to me, "What do you think I ought to do?"

"Well," I said, "the best thing for you to do is to go to a lawyer and consult him and do what this lawyer tells you. If you ask me as a lawyer I would tell you to avail yourself of your consitutional privilege. I know they want me to lie, Davis, Schopick and Hoffman, and they warned me that they were going to lie, and that I will, knowing that they are going to lie, that I will protect my interest."

Q. Now did you say anything to Mr. Berman on this occasion or any other occasion that you had done him a good turn and the least he could do for you was not to talk about it?

A. No, such conversation ever took place.

Q. Did you say anything to him in words or in substance that the years of the Gotham Beef case, so we can all understand it, that the statute of limitations had expired and they couldn't be prosecuted even if there was a fraud?

A. No such conversation took place.

Q. Did you ever tell him that he had nothing to fear by not talking?

A. I never told him anything of that kind. I told him to consult a lawyer.

Q. Incidentally, were you told, speaking about this Gotham case, that any money, that this cash was to be used for any improper purpose in connection with it?

A. No, sir. On the contrary, they specifically mentioned that it was a contingent fee.

Q. In which you had no interest?

A. In which I had absolutely no interest.

Q. Out of which you got no money at all?

A. I never received a dollar, in currency, no, sir, or any part of it. The only money I received was the $1,750.

Q. Did you ever tell Mr. Berman to tell a lie?

A. I certainly did not.

[fol. 684] Q. Did you ever tell Mr. Berman that the whole thing was a political hulabaloo and it would all blow over and not to be concerned with it?

A. No such conversation took place, Mr. Singer, and I never told him that.

Q. Now, speaking of Mr. Marks, were you ever told by Davis—

A. Was I ever what?

Q. Were you ever told by Davis at any time that he was going over to see Marks to try to get Marks not to talk?

A. No, I was never told that no.

Q. Here I will get the indictment. Did you on March 10, 1952, or on any other day, ask anyone to see, talk to or communicate with Morton Marks, directly or indirectly, with the intent to influence his testimony or to get him to lie or impede justice in any way?

A. I did not.

Q. Did you ever see Mr. Marks in that year of 1952?

A. I had not seen him in 1952 or probably a long time before that.

Q. Speaking of the sixth count, did you on March 15, 1952 in New York or anywhere else send anybody to, yourself do it, or aid and abet anybody else—and you know what aid and abet means, don't you?

A. I do, yes.

Q. To get Mr. Louis Berman to lie, to refuse to answer, or to impede or obstruct justice in any way anywheres?

A. I did not.

Q. Now, on March 18, 1952 or on any other day, did you have any such dealings, directly or indirectly, with Mr. Tobias?

A. At no time, sir.

Q. There was some talk here about some books and records of Schopick & Davis. Do you remember the questions about a certain book?

A. Yes, I do.

Q. Do you remember when some revenue agents or special agents came in to examine the books and records of Schopick & Davis?

A. I do.

Q. Do you remember when that was?

A. I think it was the latter part of 1951. It could have been a little later, when Mr. Meehan, Mr. Hulnick and a Mr. Murray came to the offices of Schopick & Davis.

[fol. 685] Q. Did there come a time, while they were working on the books of Schopick & Davis, that they examined your books and records?

A. Well, they told me that——

Q. Did such a thing occur?

A. Such a time did occur, yes.

Q. Did you produce every record and book that they asked you for?

A. I produced everything, brokers' accounts, my stubs, my checks and every record, my income tax returns, and every record they wanted I produced and they examined it carefully.

Q. Do you remember any conversation between one of

these agents and Mr. Davis relative to that book we have been talking about here in the courtroom?

A. While Mr. Hulnick was asking me questions about my brokerage accounts, he asked Davis to come into the office and he says, "Mr. Davis, I have been asking for a ledger which contains a list of disbursements and the names of your clients and the fees. Now, I have been asking for that ledger a number of times. Where is it?"

Mr. Davis replied that when Schopick and Hoffman moved out of the office, the ledger was lost.

"Well," he says, "you tell Schopick. Call him up and tell him"——

Q. Who said this?

A. Mr. Hulnick. He called Schopick, and Schopick came over to the office and Schopick says he has looked for it or he will look for it, but there was absolutely no dispute that there was such a book in existence. Well, they were never able to get that book.

Q. Who was never able?

A. Mr. Hulnick. The revenue agents were not able to get that book. They wouldn't produce it. They said it was mislaid.

Q. Did you later on have a talk with Mr. Davis and Schopick about that book?

A. I certainly did. I had a talk with Mr. Schopick and Mr. Davis.

Q. Did they tell you what occurred with respect to that book?

A. I says, "What really happened to that book?" We were friendly at that time. I says, "What happened to that book?"

[fol. 686] They says, "Max, you don't seem to understand. We couldn't produce that book. We brought the book down to a firm by the name of Friedman & Dann," who were clothing people and were clients of Mr. Davis; that Mr. George Jerris, who did a considerable amount of work for Davis and prepared their returns and kept that very book and other books, he was at that time employed by Friedman & Dann, who ran a number of companies, and they brought the book down to that firm, and the following

day Mr. Schopick called at the firm and met Jerris. He removed the book and he brought——

The Court: Who is telling you this?

The Witness: Schopick & Davis.

The Court: Both of them?

The Witness: Yes, sir.

The Court: You don't know it of your own knowledge; that is what they told you.

The Witness: Yes, I could say I don't know it of my own knowledge, that is right.

The Court: Go ahead.

The Witness: That they brought the book down to the Standard Aromatics Corporation, which was an essential oil firm. Mr. Davis' nephews were interested in the firm and Mr. Davis had a financial interest in that firm, and the book was left there. Later Schopick told me that the book was destroyed and I says, "That was a very stupid thing to do."

"Well," he said, "listen, we couldn't let them have this looseleaf ledger that contained the names of all our clients because we had received from a great many clients currency and check in tax cases, and we had also received checks that we cashed that didn't appear on our bank account, and we were not worried about the Pattullo case and the Gotham case, but these records would conclusively show [fol. 687] that your income tax returns for 1946, 1947, 1948, 1949 and 1950 were fraudulent, and that the Government could build up an air-tight case."

I think that was the end of the conversation.

Q. Now, Mr. Halperin, you realize that you are charged here with a conspiracy?

A. I certainly do realize it.

Q. Did you engage or enter or plan with anyone—whether it be Davis, Hoffman, Schopick or anybody else—or agree to commit any crimes?

A. I never did, Mr. Singer.

Q. Did you fix a tax case or try to fix a tax case or any other kind of a case?

A. I never fixed a tax case or fixed any case in my 45 years of practice."

Q. I am concerned with 1947, 1948, 1949, 1950, 1951, right

up to now. Did you do anything, even right now, which was illegal or even unethical in any of these matters you have discussed?

A. I didn't do anything illegal, nor did I do anything, in my opinion, that was unethical.

Mr. Singer: Your witness.

The Court: You may cross examine.

Cross examination.

By Mr. O'Hara:

Q. In early 1952, did you liquidate your brokerage account?

A. No, I sold some stocks in 1952, and I used that money to reduce my loan with the Chemical National Bank, and I also paid off a loan to the Mutual Life Insurance Company.

Q. Mr. Halperin, you understand the question. I asked you if you liquidated your brokerage accounts. You are now explaining what you did with the money. I didn't ask that, did I?

A. Do you mean all my—I did not. I had stocks from 1946 to 1954.

Q. And how many stocks did you continue to hold after you sold some of them in 1952?

A. I had——

Mr. Singer: Would you like your records to help you?

[fol. 688] The Witness: I think I recall. I didn't have too many stocks. I held I believe 300 shares of Clayton & Lambert that I purchased in 1946 and held them until 1954. I had 200 shares of Collins & Aikman that I purchased in 1945 or 1946 and also held until 1954. I had made some trades in between. I bought some Radio Corporation of America and sold it. I didn't have any extensive holdings either in 1952 or subsequent or probably for some years before.

Q. Would you say that you sold the majority of the stocks you owned in value in the early part of 1952?

A. Mr. Singer, I would like to have—will you kindly give

me that book? I don't think I sold the majority of the stocks. You mean in number?

The Court: Majority of stocks in value, Mr. O'Hara asked you.

The Witness: I am sorry.

Mr. Singer: Are these the ones you want?

The Witness: I think so.

I sold around March 400 shares of Radio Corporation of America.

The Court: Wait a minute. Mr. O'Hara asked you a specific question. Would the reporter read back that question and you will answer that question.

(The reporter read back the following question:

"Q. Would you say that you sold the majority of the stocks you owned in value in the early part of 1952?")

The Witness: I would say that I did in value, yes.

Q. Did you have a savings account at that time?

A. I didn't have a savings account myself, no.

Q. Did Mrs. Halperin have one?

A. Mrs. Halperin had a savings account.

[fol. 680] Q. Do you know if that savings account was closed out at that time?

A. I don't know whether it was closed out. I didn't handle her account. She might have taken some money and bought some E bonds. I don't know whether she closed out her account.

Q. You didn't know anything about her affairs?

A. Oh, I certainly did. I knew everything my wife did, but I have no recollection of it.

Q. But if she closed it out, it would not have been at your direction. Is that right?

A. No, it would not be at my direction.

Q. In your practice of the law, have you tried cases?

A. Many cases for the first 35 years, many cases in the Supreme Court——

The Court: All right, now that answers the question.

As a lawyer, when the question is asked you, answer the question. You know how to answer questions. Don't makes speeches.

The Witness: All right.

Q. You have been a trial lawyer, right?

A. Yes.

Q. You have tried cases before juries?

A. Many cases.

Q. Have you tried criminal cases?

A. Never tried criminal cases.

Q. Are you admitted to practice in this court?

A. I never was admitted to practice in this court.

Q. And you have never handled any cases in this court?

A. I have retained counsel. I never handled any cases myself in this court.

Q. You are sure that you were not admitted to practice in this court?

A. Yes, I am positive.

Q. And you never at any time have stated that you were admitted to practice in this court and handled cases here. Is that right?

A. To the best of my recollection; I wouldn't make that kind of a misrepresentation.

[fol. 690] Q. How long have you known Mr. Grunewald? I would like to know the year you met him.

A. I think I met Mr. Grunewald about 1920, 1921, 1922.

Q. At that time, what kind of a practice did you have, Mr. Halperin?

A. Was that during the prohibition era? Well, I represented a great many wholesale druggists, and a Government concentration warehouse in Brooklyn called the Keap Warehouse, and as a result of which I tried many revocation proceedings in the Prohibition Unit. A client of mine was charged with violating a permit, selling liquor that was not in accordance with the regulations. I did appear for him.

Q. Would it be true to say that you were a specialist in Prohibition Unit matters at that time?

Mr. Singer: I object to it. It has nothing to do with the issues in this case.

The Court: I will allow it. It is cross-examination.

Mr. Singer: I respectfully except.

The Witness: I have heard an awful lot about specialists——

The Court: You can answer questions. Don't make speeches. You can say yes or no——

Mr. Singer: Now, you asked——

The Court: Now, wait a minute.

Mr. Singer: May I be permitted to make a statement to your Honor?

The Court: When I finish talking, you may.

Mr. Singer: Oh, yes, I thought your Honor had finished.

The Court: I said to the witness you can answer questions. Answer them directly. Answer them yes or no with an explanation. I will not cut off the explanation. I will cut off speeches which have nothing to do with the question. [fol. 690a] Mr. Singer: And I say to your Honor that anybody that asks anyone if he is a specialist in the law cannot expect a yes or no answer.

The Court: I said yes or no with an explanation.

Mr. Singer: So far as I can see it, I want him to answer every question that is asked, but I think that nobody ought to tell a man to say he is a specialist or to ask him whether he was. I know I have been trying criminal cases since I was in practice and I am not a specialist at it.

The Court: Now, you are too modest.

Mr. Singer: I won't let anybody dare call me a specialist.

The Court: You are much too modest.

Mr. Singer: I dare anybody to call me that. I wouldn't want anybody to dare call me that.

The Court: If he says No, I wasn't a specialist, or Yes, I was, or I don't know whether I can be considered as such, why, he can answer the question, but he doesn't have to make a speech.

All right, read the question.

(Question read.)

The Witness: I didn't regard myself as a specialist, no.

Q. Did you at that time carry on other branches of practice other than prohibition work?

A. Oh, yes, I practiced the general practice of law.

Q. Isn't it a fact that at that time you represented the major portion of all permittees in the New York area?

Mr. Singer: I object to it. It has nothing to do with the issues in this case.

[fol. 690b] The Court: It is proper cross examination. Your objection is overruled.

Mr. Singer: I respectfully except.

A. I would say that you are entirely mistaken.

Q. And you have never so testified?

A. That I what?

Q. That you represented the major portion of all permittees in the New York area more than any other lawyer in the City of New York?

A. No, I certainly have no recollection of testifying to anything like that, and I——

The Court: All right, you answered the question.

The Witness: All right, the answer is certainly no.

Q. Do you recall that you gave testimony in Washington in connection with an application you had pending there before the Treasury Department?

A. I have no recollection. I think I did appear at some hearing, yes.

The Court: Is that in connection with an application?

The Witness: It was in connection with an application.

The Court: What is your answer? You started out by saying no and then you say you do have a recollection.

The Witness: I would have to explain it, though. Your Honor says you will permit me to explain it.

The Court: Then don't say no. Give an answer to it with an explanation, if you want.

The Witness: I don't recall distinctly testifying, but if Mr. O'Hara says I did, I will take his word for it.

Mr. Singer: Would you tell me the dates so that we know what you are talking about?

Mr. O'Hara: Surely, 1926.

[fol. 690c] Mr. Singer: Now, I object to any questions——

The Court: What do you object to?

Mr. Singer: —Concerning what occurred in 1926, 29 years ago.

The Court: Objection overruled. This is cross examination.

Mr. Singer: I respectfully except.

The Court: It is a proper line of cross examination on an impeachment of a statement, if it is impeached. You know that, Mr. Singer. You are overruled.

Mr. Singer: I don't know it, your Honor.

The Court: Well, now you do.

Mr. Singer: And I don't know it now, I must respectfully say to you, and there is nobody in the world I say that can remember what happened 29 years ago.

The Court: Next question, Mr. O'Hara.

By Mr. O'Hara:

Q. Does that help to refresh your recollection?

A. Does what help to refresh my recollection?

Q. Whether or not you testified, now that you have the date?

A. I have no clear recollection.

Q. At this time you say that you were not almost exclusively engaged——

The Court: At what time?

Mr. O'Hara: Back between 1920 and 1924.

A. I was not exclusively engaged in trying prohibition matters, no.

Q. And at that time you would say that you had not represented to anyone that you represented more of these permittees than any lawyer in New York?

[fol. 690d] Mr. Singer: Would you fix the time, please.

Mr. O'Hara: 1926.

A. No.

Q. You would not make that statement, right? It would not be true? You would not have made it at that time?

A. I say I did not represent more permittees than any other lawyer.

Q. At that time, in 1920, 1921, that is when you first met Mr. Grunewald. Is that right?

A. That is correct.

Q. Do you recall what he was doing when you first met him?

A. I think Mr. Grunewald was an agent.

The Court: What kind of agent?

The Witness: A prohibition agent.

Q. Did you tell Mr. Davis about that when you were telling him about these other connections of Mr. Grunewald?

A. No. What was the importance of that? No, certainly not.

Q. It was prior to that time that he had been an FBI agent, wasn't it?

A. I believe he was an FBI agent during the First World War.

. . . . . .

Q. Now, during the luncheon recess have you thought any more about the time you testified in Washington in 1926?

A. I have no recollection of what I did in 1926. Let us see. Let us count that quick——

The Court: Let us answer the question.

Q. Do you have any better recollection of it?

A. Beg your pardon?

[fol. 690e] Q. Do you have any better recollection of that?

A. I didn't give it any thought. I don't know. I don't remember what I did in 1926.

Q. Have you been a witness on very many occasions, Mr. Halperin?

Mr. Singer: What is that?

Q. Have you been a witness on very many occasions?

A. During my period——

Q. Yes.

A. I wouldn't say I was a witness often, no.

Q. Would you say if you testified at considerable length you would recall it?

A. I would, but I don't recall testifying in 1926. I have no recollection of it.

Q. I ask you, do you recall this question and answer——

The Court: He said he doesn't recall testifying. So you had better refer to what you have.

Mr. Singer: I object to anything concerning 1926. It has nothing whatever to do with this case.

The Court: Your objection is overruled.

Mr. Singer: I respectfully except.

The Court: All right. You had better refer to what it is. The witness has testified that he didn't make certain statements under oath. Now if he did——

Mr. Singer: It isn't impeachment at all, your Honor, very respectfully, as to what was done in 1926.

The Court: I overrule the objection and you may have an exception.

Mr. Singer: And I didn't interfere with any other part of the cross-examination, except that I repeat now again, I say in my opinion it is improper, it is unfair, it is almost [fol. 690f] inhuman to expect anybody to remember what happened 29 years ago.

The Court: You may ask the question, Mr. O'Hara.

Q. "Q. Did you or—did you not represent the majority of permittees in New York? "A. I represented—I can't say I represented a majority, but I will say I represented a major portion of permittees. They are retail drugstores, wholesale drugstores or permittees who had alcohol permits. I did represent a great many, more so probably than any other attorney probably in New York."

Now, do you recall that question and answer?

Mr. Singer: Now I object to it on the following grounds: First, it isn't inconsistent with what the witness said. The witness said he represented——

The Court: Don't tell me what the witness said. State your objection.

Mr. Singer: Well, I must for the record. The testimony is in the record.

The Court: The testimony is in the record, so you don't have to repeat it.

Mr. Singer: Well, I don't want anybody to say that he gave the name of one big firm and a number of other firms that he represented.

Second, it relates to an incident having nothing whatever to do with the case. And third, it has no reflection, nothing that would affect the character of the man, as to whether he represented one person, a thousand persons or every person in a particular business, and the only thing which you can attack a man's credibility on is an improper act in his life, some crime; not whether he represented—— [fol. 690g] The Court: No, Mr. Singer, you have stated your objection. Your objection is overruled. There is certainly no reflection upon a lawyer in representing an in-

dustry or a segment of an industry. The only reason I am allowing the question to be asked is that the witness has indicated something to the contrary. If he testifies otherwise, why, that may be used for argument.

Do you recall being asked that question and giving that answer under oath?

The Witness: I do not recall it right now.

The Court: He said he doesn't.

Q. Do you deny it?

A. I beg your pardon?

Q. Do you deny it?

A. I told you before that I have represented a great many permittees.

Q. I say do you deny it?

Mr. Singer: Now, I object to it. Nobody is required to deny what he can't remember.

The Court: Wait a minute. Refer the witness to the proceeding, Mr. O'Hara, where this statement is.

Mr. MacMahon: Your Honor, could we argue that in the absence of the jury, please?

The Court: Well, I don't think it is worth dispensing with the jury to argue it. Ask the man the question whether he was asked——

Mr. MacMahon: Your Honor, I submit that it is, in all sincerity.

The Court: Is the only purpose that you are asking this question to impeach the witness on the testimony that he previously gave about the extent of his practice?

[fol. 690h] Mr. O'Hara: That is the only reason, of course.

* * * * * *

Q. Did it come to your attention that at one of these hearings, a public hearing, Mr. Davis had been asked whether or not you, Halperin, had taken $100,000 in cash to Washington?

Mr. Singer: Now I object to that on the ground that the statute says that no testimony taken before the committee can be used in any other trial.

Mr. O'Hara: Your Honor, Mr. Singer was using it here at one time.

The Court: What statute are you referring to, Mr. Singer? You had better give me a memorandum. The only question is whether the witness knew he said that. It is not proof that that is so.

Mr. Singer: Well, then, what are we talking about? That he heard something?

The Court: I think it is only a preliminary question. Certainly if Mr. Davis was asked that question before a committee, it is no proof that that actually happened.

Mr. Singer: It is no proof that he answered——

The Court: He was asked whether he heard that Davis was asked that.

Mr. Singer: I object.

[fol. 691] The Court: Overruled.

Do you know that Mr. Davis was asked and gave any statement about that?

The Witness: I do not.

Q. You don't recall whether he was asked about that?

A. I don't recall.

Q. If there had been any publicity about that at that time you would have been very much concerned if the question had been asked about you taking $100,000 in cash to Washington, wouldn't you?

Mr. Singer: That is objected to.

The Court: Objection overruled.

Mr. Singer: I respectfully except.

The Witness: You mean if I read it?

The Court: Yes.

The Witness: You mean if I read it? Certainly I would be concerned.

Q. Is it unfair to assume that you read everything that was in the newspapers about the Pattullo Modes case?

A. Well, I didn't make any—if I happened to read a paper and there was something about the Pattullo case, I would read it. I didn't go out and buy every newspaper in print to read about it.

Q. You didn't like to see what the newspapers were printing about the Pattullo Modes investigation?

A. Certainly I did.

Mr. Singer: I object to that. I don't see——

The Court: Objection overruled.

Mr. Singer: Will your Honor permit me to object to it on the ground that it is incompetent, irrelevant and immaterial what a newspaper printed about anything.

The Court: Your objection is overruled. This is cross examination.

[fol. 692] Mr. Singer: I except.

The Witness: I read the same papers I read every day, and that was the evening paper and the morning Times. If there was anything about those cases in those papers I would have undoubtedly read it.

Q. You can't remember? You have no recollection whether or not that question was asked of Mr. Davis?

A. I have no recollection.

Q. Did it come to your attention——

Mr. Singer: I object, your Honor, on the same ground urged.

The Court: The witness says he has no recollection.

The Witness: I have no recollection.

Mr. Singer: I respectfully except.

Q. In any event, after these public hearings you continued to stay in the office and Mr. Davis continued to stay there?

A. That is right.

Q. Did Mr. Schopick consult you as an attorney with respect to these things he told you?

A. Mr. Schopick is an attorney.

Q. I mean, he wasn't retaining you to represent him, was he?

A. Certainly not.

Q. I mean, there was no relationship of attorney and client there?

A. No, not at all.

Q. You were a member of the Bar of many years standing, is that correct?

A. That is correct. That is in evidence.

Q. And when these matters came to your attention did you inform the Grievance Committee of the Association about it?

A. No, I did not. I am not an informer. Neither am I a

stool-pigeon. I don't think it was my duty to go to anybody to tell them.

Q. You didn't tell anybody about it?

A. No, I didn't tell anybody about it, no.

[fol. 693] Q. And you didn't inform anyone, of course, in the Government about it?

A. I didn't inform anyone in the Government. I think the Government knew about it. That was the reason for them to make that statement of concealment of their assets; the Government knew about it. The grand jury in Brooklyn were trying to get their books in order to examine the clients to make a case against them, but they couldn't——

Q. You were working very closely with them in connection with this grand jury investigation, weren't you?

A. Who was working very closely?

Q. You were.

A. I wasn't working very closely with them, no.

Q. Well, you were certainly close enough to have gained all this information?

A. I gained the information before a certain thing happened, and fortunately—it was fortunate that I gained the information, and if you permit me to tell you——

Q. You are not responsive.

A. I said, if you permit me to tell you. I don't want to be irresponsive in the answer.

Q. Did you obtain a card to practice before the Treasury Department?

A. I did.

Q. When was that?

A. 1949.

Q. When the powers of attorney were filed in the Gotham Beef and Pattullo Modes cases you weren't permitted to appear before the Treasury Department because you didn't have a card?

A. And I didn't appear, that is right.

Q. In the Clover case you did appear, though, didn't you?

A. Yes, sir, temporarily, I did appear.

Q. You now had a card; so you signed the power of attorney?

A. Yes. I was put on the power of attorney and signed it, yes, sir, and then it was canceled.

Q. When you were before the Brooklyn Grand Jury did they ask you about the business of Schopick & Davis?

A. They gave a list of cases. They asked about a list of cases that were not familiar to me, did I know this client, did I know this.

[fol. 694] Q. Did you tell them you didn't know anything about the business of Schopick & Davis?

A. I don't think so. I don't know, Mr. O'Hara. I don't remember.

Q. You don't remember whether it was asked of you?

A. I don't remember whether it was asked of me.

Q. Did you at that time know anything about the business of Schopick & Davis?

A. Just as I testified before, in a very, very general way. I mean, I knew of the great activities in the office. I knew they were handling many, many, many tax cases. I would guess it was a pretty big number.

Q. And they were very secretive about it I think you said?

A. They were secretive about the retainers and so forth, yes, and the names.

Q. But you participated in two of them, is that right?

A. Well, I think the testimony shows that, yes.

Q. Three of them?

A. Well, I would say two, and you can mention the Clover case.

Q. Now, I believe you just said you filed a power of attorney before the Internal Revenue Bureau in the Clover case, is that right?

A. Yes, sir.

Q. And you never filed a power of attorney in any other case, or am I wrong in that?

A. You are correct.

Q. That is the only case you ever filed a power of attorney in?

A. That is correct.

Q. Do you recall whether or not you were asked before the Brooklyn Grand Jury whether or not you ever filed a power of attorney with the Internal Revenue Bureau?

A. I don't recall the question.

Q. You don't recall?

A. I don't recall the question, but if the question was

asked, the answer would have been no, just like I am testifying now.

Q. Were you asked this question and did you make this answer before the grand jury in Brooklyn when you testified:

"Q. Have you ever filed a power of attorney with the Bureau of Internal Revenue in any office thereof? A. I refuse to answer on the ground that the answer might tend to incriminate me."

[fol. 695] Mr. Singer: Oh, I object to that.

The Court: On what basis?

Mr. Singer: I object to it upon the ground that it is incompetent, irrelevant and immaterial and in no way affects the issues in this case, not proper cross examination.

Mr. O'Hara: Do you want the cases on it, your Honor?

The Court: Yes.

(Mr. O'Hara hands up law books.)

Mr. Singer: He has a right to rely on constitutional privilege and it is not a proper subject of cross examination. Oh, I know the only case on it.

Mr. O'Hara: Your Honor, those are all marked if you want to look at them. They are Court of Appeals decisions.

The Court: Your objection is overruled. You may have an exception.

Were you asked that question and did you give that answer?

The Witness: I gave the answer and I would like to repeat.

The Court: No, no. Were you asked that question and did you give that answer?

Mr. Singer: And I object to it, and the Court has not yet ruled——

Oh, you have, I am sorry.

The Court: I overruled the objection. You have an exception, and the witness has answered.

The Witness: Yes.

Mr. Singer: Before you proceed, may I show your Honor the very beginning of that? If you just look at the first line of the brief, you find the word voluntarily. That is really not a matter for the jury to determine. The Rafael case,

and I haven't read it since it came down, was a case where the defendant testified, took the stand in his own behalf. Now, that is quite a different situation from when you are [fol. 696] subpoenaed as a witness, and I say that the authority of the Rafael case has nothing to do whatever with this situation. It was a voluntary taking of the witness stand.

The Court: I take it this witness is a voluntary witness.

Mr. Singer: No, he wasn't when he was before the grand jury in Brooklyn. That is the difference between the two situations.

Mr. O'Hara: If I may say so, it is a question whether it is voluntary when he takes the stand at the trial.

The Court: The witness may explain his immunity there, but he is now being asked whether he did claim it. That is all.

Mr. Aranow: I except.

Mr. Corbin: Maybe this is supplemental to the thought expressed by Mr. Singer, but it seems to me to be a cardinal principle that an assertion of a constitutional right, including the assertion of privilege allowed in the Fifth Amendment, that it can in no event, nowhere, at any time, can never be regarded as a disparaging circumstance or as containing within it any implications of any crime or wrongful act. Were it not so, obviously, the privilege itself would be a snare. There cannot be implicit, Judge, in the assertion of a constitutional right anything wrong or disparaging of the one who makes the assertion; else the right itself is worse than nothing. And for the same reason, our forefathers who established it and promulgated it back in the days of the Stuarts, and right down through, Judge, they must have been——

The Court: That is an interesting question on which I think the Court will disagree with you, and I have ruled on it. If I am wrong you have an exception.

[fol. 697] Mr. Aranow: May I join in that exception?

Mr. O'Hara: In view of the speech that has been made I should like to state the Government's position.

The Court: I know the Government's position. As I see it, Mr. Corbin, no witness can be compelled to testify against himself. The witness is called before the grand

jury and the answer was, I refuse to answer something on the ground that if I answer that question it will incriminate me.

Mr. Corbin: Tend to incriminate.

The Court: Or tend to incriminate. A witness can make that statement. No witness has to take the witness stand, as I understand the law and if a witness has so stated, then he could not be compelled to take the stand here, but if a witness voluntarily takes the stand and is asked in a previous proceeding did you say any testimony on this subject would incriminate you, that can be considered by the jury for such benefit or such worth as the jury may want to give it.

Mr. Corbin: And that would be on the theory and the assumption that the assertion of the privilege is a disparaging circumstance.

The Court: That is something which can be argued. I have ruled on the question.

Mr. Corbin: Judge, one thing more and I will subside. I just want to make this point.

The Court: I am glad you are well and recovered, Mr. Corbin. I am not going to cut you off, but I would like to move on with the trial.

Mr. Corbin: I want to point out that there is no, and can be no implication of wrong or of crime or of an admission of crime implicit in the assertion of the privilege.

The Court: If you think I should so instruct the jury give me a memorandum of law on it and I will consider whether [fol. 698] I should so charge the jury. Everybody has the same exception. You may proceed, Mr. O'Hara. I don't think you need argue the matter because I have ruled.

By Mr. O'Hara:

Q. Do you recall being asked before the grand jury if you knew Mr. Oliphant or had ever met him?

A. I do not.

Q. Were you asked this question and did you make this answer:

"Q. Do you know Charles Oliphant? A. I refuse to answer the question on the ground the answer might tend to incriminate me."

Were you asked that question and did you make that answer?

Mr. Corbin: I object to it on the same ground.

The Court: Objection overruled. You have an exception. You may answer.

Mr. Singer: Of course, I have objected to the line.

The Court: Your objection is noted to the line.

The question is were you asked that question and did you make that answer before the grand jury?

The Witness: I have no recollection, but if Mr. O'Hara has the minutes before him and he says I made the answer I am willing to take his statement for it.

Q. Well, you will admit you made that answer to that question?

A. I have no independent recollection except what you tell me.

Q. Now, Mr. Halperin, you know the rule about proving minutes, do you not?

A. I know what?

Q. You know the rule, how you prove minutes?

A. Yes.

Q. You understand that if you do not admit making that answer that I must call the stenographer?

[fol. 699] Mr. Singer: Oh, I object to that. There isn't any such rule. We haven't questioned the authenticity.

The Court: Well, will you concede it?

Mr. Singer: The witness has said if the record shows it he will say that it happened that way. What more do you need than that?

The Court: I guess we need a determination as to whether the authenticity of these minutes Mr. O'Hara is conceded. I don't know anything about that. Do you concede it?

Mr. Singer: Have I seen them?

The Court: I don't know.

Mr. Corbin: As I understand the witness he said if Mr. O'Hara said it is there, it is there. So there can't be any issue.

Mr. Singer: Why argue with the man a question of law?

The Court: Then you say if those are in those minutes

that Mr. O'Hara has you will admit you were asked that question and gave that answer?

The Witness: Yes. I will admit that I was asked that question and gave that answer, if you have the minutes before you.

Q. Now, did you ever hold any money in escrow with Leo Greenstein from the Gotham Beef Company and deliver it when you received notification that there would be no prosecution in the case?

A. Are you asking me that question or is that in the minutes?

Q. I am asking you that question.

A. As to whether it was asked before the grand jury?

Q. No. I am asking you that question.

A. Will you kindly repeat that.

(Question read.)

A. The money was held in escrow but I didn't deliver it to him. He took it himself.

[fol. 700] Q. Do you recall being asked about that before the Brooklyn Grand Jury?

A. I do not.

The Court: You don't remember the subject ever coming up?

The Witness: Yes, sir, it came up, yes. A lot of subjects came up.

The Court: You don't remember that particular subject about the escrow?

The Witness: It probably was asked about. I am not clear about it.

Q. Were you asked this question and did you give this answer: "Did you ever hold money in escrow with Leo Greenstein from the Gotham Ship Purveyors or the Gotham Meat Company and deliver it when you received notification that there would be no prosecution in the case? A. I refuse to answer that question on the ground that the answer may tend to incriminate me."

Were you asked that question and did you make that answer?

Mr. Corbin: I object to that, Judge.

The Court: Same ruling.
Mr. Corbin: Exception.

A. I say the same thing. I have no independent recollection. If you say that the question was asked and I gave the answer, I will admit that the question was asked and I gave that answer.

Q. Now, do you recall whether or not you were asked if you knew Max Steinberg?

A. I don't recall independently of what you are reading. I do not recall.

Q. Were you asked this question and did you give this answer: "Do you know a group chief by the name of Max Steinberg? A. I refuse to answer the question on the ground the answer may tend to incriminate me."

Mr. Singer: Same objection.

[fol. 701] The Court: Same ruling; same exception.

A. Same reply.

The Court: Well, were you asked that question and did you give that answer?

The Witness: I have no independent recollection. I cannot recall what was asked in 1952 right now. I was asked a number of questions. If Mr. O'Hara says the question was asked and I gave that answer, I will concede it.

Q. Now, were you asked about a telephone call to Mr. Grunewald relative to an appointment for Mr. Davis with Mr. Bolich? Do you recall that?

A. Quite possibly. I have no independent recollection of that right now.

Q. Tell me, at the time you testified before the grand jury did you make any notes of the testimony you gave there and give it to Mr. Singer?

A. No, I did not.

Q. Not at any time?

A. What was the date of that? I don't know whether Mr. Singer was in the case yet. I think I retained Mr. Singer in April or March, or April of 1952.

Q. I am reading from May.

A. May?

The Court: May, 1952?

Mr. O'Hara: That is right

The Witness: Well, Mr. Singer was my counsel then. I didn't make any notes, no.

Q. Did you ever make such a telephone call that I just asked about?

A. I did not.

Q. Were you asked this question and did you give this answer: "Q. When the law firm of Schopick & Davis was unable to get a conference with Mr. Bolich on the Gotham Ship Purveyors case, did you make a telephone call to Mr. Henry Grunewald? A. I refuse to answer that question on the ground the answer may tend to incriminate me."

[fol. 702] Mr. Singer: I object to it.

Mr. Corbin: Same objection.

The Court: Same ruling. Same exception.

Were you asked that question and did you give that answer before the grand jury in Brooklyn?

The Witness: If Mr. O'Hara says the question was asked and I gave the answer I will concede it.

Q. Now, did you ever meet with Mr. Henry Grunewald in the Munsey Building in Washington?

A. Yes. During the early years, I mean around 1944 and 1945, possibly 1946, before he had his Washington suite of offices in the hotel.

Q. Do you recall being asked about that before the Brooklyn Grand Jury?

A. I have no recollection.

Q. Were you asked this question and did you give this answer:

"Q. Did you ever meet with Henry Grunewald in the Munsey Building in Washington? A. I refuse to answer that question on the ground that the answer may tend to incriminate me."

Mr. Corbin: I object to it.

Mr. Singer: I object.

The Court: Some ruling.

Mr. Corbin: It has become perfectly obvious that the objective of Mr. O'Hara in asking these questions is not to

elicit information, it is not to elicit answer , it is to establish only a series of refusals to answer upon the assertion of the constitutional privilege, and inherent in this whole line is the assumption and the inference that there is something wrong in the assertion of the privilege, and therefore I object to it.

Mr. MacMahon: Your Honor, may I answer that one? The cases are clear that a witness can't blow both hot and cold in the assertion of the privilege. If he takes the stand we have a right to use his earlier claim of the constitutional [fol. 703] privilege. The law is clear on that.

The Court: I have ruled on it.

Mr. Rosenblum: I except.

The Court: What was your answer to that.

The Witness: I don't recall the answer.

The Court: Would an answer to that question have incriminated you or tend to incriminate you?

Mr. Singer: Now, may I object.

Mr. Corbin: I object to it.

The Court: All right, I will withdraw it. Mr. Corbin raised that point. I will withdraw the question.

Mr. Singer: At this point Mr. Corbin——

The Court: Mr. Corbin said it was for one purpose and I asked a question to find out whether the witness was testifying truthfully.

Mr. Singer: Mr. Corbin and I——

The Court: I will withdraw the question. So there is nothing to argue about.

Mr. Singer: I would like to ask about that on re-direct.

The Court: All right. You can ask about it on re-direct.

Mr. Singer: I intend to.

Mr. Rosenblum: Your Honor will recall the same line of questioning was put to Mr. Segel and I think Mr. Marks, and upon the advice of Mr. Kostelanetz, even though there was an agreement to tell the truth, they answered every possible question, I refuse to answer on the same ground.

The Court: That can be pursued.

Mr. O'Hara: We heard these people testify, but now that we are making speeches——

The Court: Go ahead with the next question.

Mr. Corbin: This is not a speech, Judge; this is a motion.

[fol. 704] Motion for Mistrial and Denial Thereof

I respectfully move for a mistrial and for leave to withdraw a juror upon the record as it has developed in the last half hour here on this line to which I have objected upon all the grounds urged against reception of the answers, and I think on the remarks of the district attorney and also on the withdrawn inquiry of your Honor, I am entitled to a mistrial.

The Court: Motion denied. You have an exception. Go ahead. Next question.

Mr. Roseblum: May it appear that I except?

The Court: Yes.

Mr. Singer: Each one of us, Judge.

The Court: Surely.

Mr. O'Hara: I might say when Mr. MacMahon made his remark, he was quoting from the Court of Appeals which says you can't blow hot and cold.

The Court: Oh, let us not argue any more.

Mr. Corbin: I renew the motion.

The Court: Your motion as renewed is denied. Go ahead. Next question.

The Witness: I have no recollection of any of these questions. I am taking your word for it and I am conceding that the questions and those answers were given.

Q. You testified here today that you did meet Mr. Grunewald in the Munsey Trust Building, didn't you?

A. When?

Q. At any time.

A. Yes. I met him any number of times in the Munsey Building. Probably 25 times. I used to go to his office there.

Q. Not to do anything wrong?

A. No, not to do anything wrong, Mr. O'Hara; I am sorry to disappoint you.

Q. You don't. Now were you asked before the Brooklyn Grand Jury if you knew Monroe Tobias?

[fol. 705] A. Probably so. I have no definite clear recollection of the questions that were asked, but I still say if you say those questions were asked and I gave those answers, I am willing to concede it.

Q. All right.

"Q. Do you know Monroe Tobias? A. I refuse to answer that question on the ground the answer may tend to incriminate me."

Mr. Corbin: I object to it the same as before.

The Court: Objection overruled.

Mr. Corbin: I make the same motion.

The Court: Your motion is denied.

Mr. Singer: Alf of us.

The Court: Surely.

Were you asked that question and did you give that answer?

The Witness: As I said, your Honor, if Mr. O'Hara says the questions were asked and I gave the answers, I will admit it. I have no independent—I don't remember the questions that were asked in 1952.

The Court: But if he says it is so, you will admit that?

The Witness: Yes, your Honor.

The Court: And you say the answers given were true?

The Witness: Yes, your Honor—well, I didn't say—I said that that was the answer.

Mr. Corbin: Same objection, Judge, to that inquiry from your Honor, because that involves the constitutional question.

Mr. Singer: Your Honor will not permit any witness here to answer—I respectfully except.

The Court: The witness says he testified before the grand jury. I want to find out, when he says the question is there and the answer is there, whether he is also conceding that he was sworn to tell the truth and it was a [fol. 706] truthful answer; not that it is merely in the minutes, but that that is the sworn testimony.

Mr. Singer: Excuse me. Without the interposition of the rest of the answer on that, I don't think it is fair for your Honor, and I say this, your Honor having been a lawyer and practiced law, to have any client say that what he did, until you have determined the circumstances under which it was done, is the important thing, and not to go to the end, and to imply that it was untrue.

The Court: I am not implying that it was untrue. I just

want to find out whether he is admitting not merely that it is in the minutes but that that is the sworn testimony.

Mr. Singer: Of course it was sworn. He was under oath. There is no question about it.

The Court: All right. That is conceded. It is conceded that that is his sworn testimony.

Mr. Singer: And at this point I would like to be permitted under the authority of the United States *v.* Remington to have a copy of all this grand jury testimony of this witness.

The Court: Well, I think probably you will be entitled to have that, but let us finish the examination.

Mr. Singer: But I would like to have it now so that I can follow the examination, and I would like to have it this afternoon and now so that I can finish my re-direct on this subject without having spoken to the witness at all.

The Court: Well, since the Court is going to adjourn in ten minutes, why, I don't believe it is possible for you to finish your re-direct this afternoon. So I will tell Mr. O'Hara to continue, and I am going to direct Mr. O'Hara to make available to you the complete grand jury minutes so that you may see them over the weekend, and if you [fol. 707] don't want to talk to your client about it over the weekend, that is up to you.

Go ahead, next question.

Mr. Singer: Your Honor rules that I may not have it now to follow this interrogation while it is going on?

The Court: If you want to see that, Mr. O'Hara is reading each question properly, lean over his shoulder.

Mr. Singer: Well, I would like to have it.

The Court: Are there any extra copies of it?

Mr. O'Hara: I don't have an extra copy.

The Court: If there is any question as to whether he is properly reading it, lean over his shoulder and follow it.

Mr. Singer: I don't question Mr. O'Hara's reading by any means.

The Court: All right, then, next question.

Mr. Singer: But I would like a copy to follow it.

The Court: Well, there are certain things a judge has power to do, but I don't have the power of creation and I can't create a copy for you.

Q. Mr. Halperin, I have asked you several questions about whether those were questions that were asked you at the Brooklyn Grand Jury, and you have no recollection of any of those questions. Is that right?

A. I am not clear about it. I know there were quite a number of questions asked, but I don't remember these specific questions.

Q. For example, you don't recall whether they asked you if you knew Monroe Tobias?

A. No, I do not.

Q. And you didn't recall whether they asked you if you had ever met Mr. Grunewald at the Munsey Trust Building?

A. I do not remember that they mentioned the Munsey Trust Building. I remember they asked me whether I knew Grunewald. I remember that.

Q. Do you remember what your answer was to that?

A. You have the answer.

[fol. 708] Q. I want to know if you remember what your answer was to that.

A. I refused to answer that question.

The Court: You refused?

The Witness: Yes, sir.

Q. You refused on the ground that the answer might tend to incriminate you?

A. I refused on the ground that I was not obliged to give any testimony of any nature that could possibly give the Government——

Q. Excuse me, Mr. Halperin, is that the answer you recall giving, that you are now giving us?

A. Well, sometimes I used the Fifth Amendment. Other times I said that I cannot be compelled to testify against myself——

Q. Mr. Halperin——

A. At the proper time and at the proper forum, where my counsel has the opportunity to cross examine witnesses——

Mr. O'Hara: I object to the witness going on in this fashion.

The Court: He says he doesn't remember what language he used. He answered in various ways. If you have a

particular question and a particular answer, why, read it.

Q. Now, as I understand it, it was in March that you had this conversation with Davis about lying?

A. Davis told me he was going to lie, if that is what you mean.

Q. In March?

A. Well, it was about that time Davis told me they had a scheme to pass this whole thing on to someone else and they wanted me to become a party to it.

Q. Of course you refused?

A. Well, you know darn well I refused. Excuse the language. You know I refused, Mr. O'Hara. I am not going to permit anybody to destroy me. I have maintained that position——

The Court: Now, no speeches.

Next question.

[fol. 709] Q. After, however, you heard this information and after Schopick had confessed to you, you continued to have office space with Davis through the middle of 1953, did you not?

A. I had absolutely no alternative. Mr. Singer advised me to remain in that office. I was paying $40 a month. I was inactive, and I couldn't get an office unless I paid about $150 a month. I had nothing to do with Davis during that time. I didn't greet him——

Q. Mr. Halperin, is that responsive to my question?

A. Well, I did remain there on the advice of——

The Court: That is an answer.

Q. That is a responsive answer. You did remain there, did you not?

A. I did remain there, yes.

* * * * * * *

MOTION TO DISMISS INDICTMENT, ETC., AND DENIAL THEREOF

Mr. Singer: I ask your Honor for permission to make a motion in the absence of the jury.

In view of the Government's insistence upon examining Mr. Halperin concerning his testimony given before the grand jury, which was investigating the very facts upon which this indictment is based, and in view of the fact that

the Government has offered at this trial proof that a hypothetical statement concerning all of the facts and circumstances testified to by the witness Davis at this trial was submitted to the United States Attorney conducting that grand jury investigation in Brooklyn; and in view of the other record facts which establish beyond doubt that the witness Marks, the witness Marjorie Segel, the witness Greenstein, the witness Tobias, the witness Berman, had all testified before the grand jury; and in view of the fact that each of these witnesses has said that his testimony, at least concerning the facts and incidents relating to the defendant Halperin, was the same as the testimony of each of these witnesses before the Court; and further in view [fol. 710] of the fact that when counsel for the defendant Halperin in certain instances called upon the Court to examine certain of the grand jury testimony of these witnesses; and in view of the fact that the Court has held in the instances where such grand jury testimony was examined by the Court that the testimony was, to use I think the Court's word, consistent with the witness' testimony here, and therefore refused the defendants the right to inspect this testimony, it appears very clearly that the defendant Halperin was subpoenaed and compelled to appear before the grand jury not as a witness but as a prospective defendant. Under these circumstances, and directly in accord with the authorities which exist, it was improper, illegal and in violation of the defendant Halperin's rights to require him to answer, without having warned him of his rights; and, unless he consented to waive his rights and was willing to be called as a witness, under such circumstances no defendant or a prospective defendant may be under any circumstances compelled to testify before a grand jury.

Now, it further appears that the defendant Halperin, having been so subpoenaed and having refused to answer certain questions upon the ground of his constitutional privileges and rights under the Fifth Amendment, is now in the position of having those very rights offered before this jury as proof of some fact or circumstance in this case. The testimony Mr. Halperin gave before the grand jury cannot be used for any purposes.

It was impossible prior to trial to make any motion in this regard since we had no information that any of the evidence used before the Brooklyn Grand Jury had been used before the New York Grand Jury which returned this indictment. However, it now, as I have said, definitely appears beyond any contradiction that he, Halperin, was not [fol. 711] a witness before the grand jury; he was being examined as a prospective defendant.

I might say that he and his indictment was the ultimate purpose of that investigation in Brooklyn, as is established here by the proof at this trial.

Under these circumstances, it does appear, beyond any question of legality, that the privileges of every person, innocent as well as guilty, under the Fifth Amendment to the Constitution of the United States, having been used here as a snare and a trap, and it is a delusion to say that a man has any rights to refuse to answer under the Fifth Amendent and then find that that very refusal is offered as a circumstance to establish his so-called responsibility under this indictment.

Now, I further say that it now appears conclusively that the very purpose for which he was called before the grand jury, as I have observed from my reading of the grand jury minutes, which I was permitted to do, when I say grand jury minutes I mean the Brooklyn Grand Jury minutes of Mr. Halperin, which I was permitted to do by the Court late Friday afternoon, it further appears that in the grand jury minutes there was read to this defendant a letter from the Pattullo Modes stockholders signed I think by each one of them; I do not attempt at this point to recollect exactly; I made no copy of it; in a further attempt to compel the defendant Halperin to testify this letter was exhibited to indicate that the clients, the Pattullo stockholders, had waived any privilege that they might have between themselves and Halperin and others as counsel.

I consider this, if your Honor please, to be as serious a situation as I have seen exhibited in any trial. So much so, that I feel it has nothing whatever to do with any of the reported authorities submitted in the United States Attorney's brief.

[fol. 712] It is quite different from a situation where a

defendant is arrested or a person is arrested and might refuse to answer under circumstances where he should.

It further appears in this grand jury testimony that the defendant, Mr. Halperin, said that he had not yet consulted counsel, and that when he later consulted me, and the grand jury testimony will show this fact, he told the grand jury that he had consulted me and that I had advised him under the circumstances not to answer any questions, upon the ground of the Fifth Amendment, and upon the ground that no one had any right to compel him to furnish any testimony which might be offered against him.

He pointed out to the grand jury at another point the fact that he had no right to cross-examine any witnesses. He pointed out in another place that he had apparently stated his reason for not testifying to someone connected with the prosecution.

Under these circumstances for the Government to attempt now or then to seek from Halperin testimony concerning incidents or persons, and then use them as circumstantial support for the testimony of a witness here was a direct evasion of his rights before the grand jury, which is being furthered, aided and assisted by the actions of the Government here in this trial.

Under those circumstances no person has any privileges. They can be called upon to later explain why the privilege was claimed in the first place. Certainly, there can be no question, and if a man states to a jury or to anyone else that he acts upon the advice of his counsel given in good faith, such action cannot be questioned at any time or be made the subject of inquiry before a jury where he is on [fol. 713] trial for the very offense for which the inquiry was conducted.

Now, under these circumstances I move to dismiss the indictment on all the grounds I have urged, and I further move for the withdrawal of a juror and the declaration of a mistrial, not only for the reasons that I have stated but also for the reasons stated in addition by Mr. Corbin and others when the motions for a mistrial were made on Friday.

I submit for my authority the case of United States *v.* Lawn, 115 F. Supp. 674; United States *v.* Miller, 80 F.

Supp. 981; Maloney *v.* United States, 79 F. 2d 566; United States *v.* Kimbal, 117 Fed. 156; Blair *v.* United States, 250 U. S. 273; and In Re Fried, 161 F. 2d 453.

Mr. MacMahon: Your Honor, I would like to speak for the Government in this connection.

One, these minutes were not offered as any circumstance from which the jury could draw an inference of the guilt or innocence of this man. They were offered for the express purpose of showing the prior inconsistent statements.

Two, at the time of the Brooklyn Grand Jury investigation there is no showing that Halperin or anyone else was at that time a prospective defendant. I think that is borne out by the fact that there were no indictments by the Brooklyn Grand Jury and also by the fact that the crime for which he is on trial here did not occur in the Eastern District of New York but in the Southern District of New York. Also it is clearly established by the cases that under those circumstances, in a general investigation such as the grand jury in Brooklyn was conducting, there is no duty to warn a witness of his constitutional rights.

The Lawn case to which Mr. Singer refers was purely a case where the witness at that time while he was being questioned by the grand jury was under an information [fol. 714] filed in the Southern District of New York charging him with a facet of the same crime about which he was being questioned.

The Court: That is the same situation that existed in the United States *v.* Window Glass.

Mr. MacMahon: Yes, sir. The hypothetical statement to which Mr. Singer referred was not offered by the Government as proof of the facts that someone had testified to all those facts before; it was offered solely for the purpose of showing that the witness Davis' testimony was not a recent fabrication, as Mr. Singer had contended, and on the ground upon which he based his contention.

Your Honor did not admit that hypothetical statement into evidence, and the witness was simply questioned on whether he had made such a statement to his attorney at that time or he made such statement to anyone at that time.

The use to which the Government put it was to show that that testimony was not a recent fabrication. It was made after his wife had sued him and after he had been indicted

for income tax evasion and after he had been indicted for conspiracy to defraud the United States in the Southern District of New York, to which he pleaded guilty.

The Court: I might say that Friday afternoon after court adjourned I made some further examination of the law on this subject, and the law seems clear that a man doesn't have to, of course, testify when called before a grand jury if something would incriminate him. He doesn't have to take the stand in this court if he is a defendant, but if he voluntarily takes the stand, then he may be cross examined as to any prior inconsistent statements, including prior inconsistent statements which he has given before a grand jury. And when a witness in this court says that there is nothing in his relations, let us say, with Mr. Tobias, [fol. 715] which were in any way wrong, and he swore under oath before a grand jury that he cannot answer as to whether he talked to Mr. Tobias because that fact may tend to incriminate him, that is a sufficiently inconsistent statement that on cross examination here, where the defendant has voluntarily taken the stand, it is a perfectly proper subject for cross examination. I think the cases in the United States Supreme Court and in this Circuit are clear on that subject.

Therefore I will deny your motion.

Mr. Singer: May I be permitted to reply very briefly?

The Court: Yes.

Mr. Singer: To the United States Attorney? First, this hypothetical statement establishes conclusively that the Government's assistants and the people conducting the Brooklyn investigation had the information before them, and that is the only purpose that this hypothetical statement is referred to in this connection; that the officials conducting that investigation for the Government had before them at that time all of the information and the testimony now given by Mr. Halperin. Two, that when the statement is made that this is offered now to establish, that this claim of privilege is offered to establish prior inconsistent statements, it fails to take into consideration the very basis of the constitutional privilege which is, and there is no language to incriminate you in the Fifth Amendment—nobody is obliged to give testimony which may be used against him, and I want to demonstrate now in two or three seconds

how a denial or an admission might be used to corroborate by circumstance the testimony of a witness, and to establish further that there is still another proposition of law which has not here been considered or mentioned.

[fol. 716] The first is this. Let us assume for the purposes of this discussion and for the purposes of my motion that Mr. Halperin had said that he met Tobias or met Mr. Marks or any of these people; would not that fact have furnished a lead without an admission of guilt to support the very testimony of these people as to what they said! In other words, to establish that he actually had met them.

Now, under those circumstances and under the cases of the United States Supreme Court, had the defendant admitted the fact that he met them, he might have been met with the next theory of law, that having made any statement in connection with the matter, he might have been deemed to have waived his constitutional privilege. Therefore, the privilege attaches long before any actual, incriminatory evidence can be adduced.

We now get to the point of a constitutional right, as distinguished from a discussion in a legal proceeding, as distinguished from a statement made not in a court or before a grand jury.

I say to your Honor now that no lawyer in the world would have a right to advise any client to refuse to answer on the Fifth Amendment if he knew that by so answering, he would be furnishing evidence or depriving the defendant of the right to ever take the stand in his own behalf.

The point involved is simple. If he said he knew Grunewald—and certainly the very fact that he knew Grunewald couldn't incriminate him—but it would begin the step in a line of inquiry which might be used not as direct incrimination, but to support a perjurious lie. It always happens that way from my experience and from every lawyer's experience, that the best lie is that woven around a solid truth.

The fact that two or three people met is used as a circumstance to support the fact of conversations which may [fol. 717] not have taken place. That is the very basis of the claim of constitutional privilege. It is not to incriminate you and the witness never said before the grand jury—he attempted to use his full constitutional privilege using

the language of the amendment; instead, as the record will appear from that grand jury testimony, when he had repeated it four or five times, he was told, well, shorten it; can't you use the word incriminate.

So that you now proceed to graduate by degrees to the point where a privilege for the innocent is now attempted to be used as proof of guilt, and it doesn't seem common sense to say that we are not using it to prove his guilt at this trial; we are only using it to establish his lack of veracity at one point or another.

But what is that but an attempt to prove here that what he has said here is inconsistent with what he has said before. If that isn't an attempt to prove guilt, then nothing could possibly be closer to such a situation.

I ask the Government now to show me a single reported case where a man was called before a grand jury as a witness under circumstances which are stronger even than the Lawn case.

In the Lawn case, the mere fact that the man was under indictment might have been relied upon by Judge Goddard to find his ultimate decision, where in the Scully case there wasn't that fact. Here in the very record it is established that all of the witnesses or most of them who have testified in this trial against this defendant have testified there, and when there weren't any witnesses to testify and where there weren't any witnesses, there was the hypothetical statement and the knowledge, full in the hands of the Government.

[fol. 718] The Court: Well, I stand on my previous decision and you all have exception.

We will now proceed with the trial.

* * * * * *

Re-direct examination.

By Mr. Singer:

Q. Now, Mr. Halperin, you were asked a number of questions concerning testimony you gave when you were before the Brooklyn Grand Jury. Do you remember those questions on Friday?

A. Yes, sir.

* * * * * *

Q. Now, do you remember being asked a question concerning the firm of Davis & Schopick and your answer, after some preliminary questions: "A. They were a firm, yes.

"Q. What business did you have with them? A. That I would have to decline to answer. I have been advised by my counsel, Henry Singer, that I must decline to answer any questions under the Fifth Amendent of the Constitution of the United States, which results in my furnishing evidence which could be used against me." Did you say that?

A. I did.

Q. Now, were you asked this question: "Do you know Herman Deutsch?" And you answered: "I must refuse to answer that question as given in the previous grounds." Do you remember that?

A. Yes.

Q. At least, you don't remember the words?

A. No.

Q. But if it appears in the record——

Mr. O'Hara: Excuse me, he doesn't have to lead him on this.

The Court: Don't lead as much as that.

Q. Now, wait. Do you attempt to remember each word of a question or answer that you gave?

A. It would be impossible to do it. So I don't attempt to.

Q. Do you rely upon this record being accurate?

A. I said that to Mr. O'Hara when he cross-examined me on Friday.

[fol. 719] Q. As a matter of fact, weren't you finally asked in substance——

The Court: Now, Mr. Singer, let us not put it in a leading form.

Q. Were you finally asked—I am going to lead him because there is no sense in reading it, to shorten your answer? Were you finally asked to shorten your answer, the long answer you had given?

A. Yes. Not to review and repeat the grounds of the Fifth Amendment and all that. I was asked to shorten it and I consented.

Q. Now, do you remember this happening, and I am reading from page 1058:

"Q. Do you know a Louis Berman? A. I refuse to answer that question—must I keep on repeating my grounds?"

"The Foreman: Yes.

"Mr. Parker: Why not"——

Who was Mr. Parker?

A. The United States Attorney in the Eastern District.

Q. "Q. Why not say I refuse to answer on the ground that it may tend to incriminate and degrade you—that is shorter—if that is what you feel it does.

"The Witness: Well, it practically means the same thing. I would rather use this phrase myself, but I will compromise."

Did something like that happen?

A. Yes, sir.

Q. In substance?

A. In substance.

Q. Now, you appeared again on May 2nd. Do you remember making this answer in substance: "On the advice of counsel, Mr. Kennedy, and on the ground that the answer may tend to incriminate me, I refuse to answer that question. I would like to refer you to some court decisions, if [fol. 720] you want the citations, where the Court of Appeals of the State of New York held that it is just as important and even more important for an innocent person to claim the privilege than it is for a guilty person." Did you say that?

A. I remember making that statement to Mr. Kennedy.

Q. Do you remember the foreman saying in substance: "Those are State cases, and now you are in the Federal court." And you answered: "I can give you all the Federal cases you want on that proposition." Do you remember anything like that happening or something like that?

A. Yes, sir, with the foreman.

Q. And then the examiner, who I think was Mr. Kennedy, I am not sure, said: "Mr. Halperin, have I disputed

your right to claim your privilege in this matter?" And you said: "No, you have not, you have not and you are doing your duty and so is the Foreman of the Grand Jury doing his duty, but this is a privilege that I regret that I am compelled to take, as I have explained to you." Something like that?

A. Yes, sir.

Q. Are you relying on this record?

A. Yes, that occurred.

. . . . . .

Q. Now, going back to Schopick, Davis and Hoffman, what did they say to you in substance before you were subpoenaed before the grand jury?

A. Well, we had a discussion. Davis was doing most of the talking and Schopick did some of the talking and Hoffman kept quiet most of the time assenting to everything that Mr. Davis was saying. Occasionally he made some kind of statement. They told me they were going over to the United States Attorney's office in Brooklyn, that they were going to make a deal for immunity if the District Attorney in the Eastern District was willing to give them immunity, but they insisted on a writing, they wanted to be sure that the District Attorney had authority to give them immunity, and they insisted that [fol. 721] before they testified that they would want special assent from the Attorney General of the United States in Washington. If when they are assured by someone in authority who had the power to give them immunity, they would then make a statement before the grand jury.

They told me the story they were going to tell. They stated that they were going to say that they had given me money in the dress case and in the Beef case to give to Grunewald, and I replied, "You are nothing but a lot of contemptible liars and you are the scum of the earth to invent a story of that character and nature."

And they said that: "The immunity will also apply to you."

I said, "I will not lie, I won't save myself to lie against anyone else. I have to live with myself, and under no circumstances would I take the witness stand and commit perjury."

"Well," they said, "listen, if you don't go along with it, there are three of us; and if you testify we will see that you are indicted for perjury."

Well, I was forewarned. It probably was a good thing that they made those threats and told me the story because I had intended to go before the grand jury and tell them everything I knew.

Q. Now, when you went before the grand jury you relied upon your constitutional rights and privileges. What was your reason for so doing?

A. My reason for so doing was in the first place the threats that they had made; in the second place, that I would not be represented by counsel; that I wouldn't have the opportunity to cross examine these witnesses; that I couldn't show whether they were lying; that I was not confronted with witnesses; that I would not be represented by counsel to examine them for the purpose of finding out really where the truth was.

Q. Did you rely on my advice?

A. I certainly did rely on your advice, Mr. Singer; when I retained you I discussed the matter with you [fol. 722] thoroughly and carefully. I told you every single thing that happened.

* * * * * * *

Q. When you claimed your privilege were you telling the grand jury that in fact these things would incriminate you or that in fact that they might be used by somebody to incriminate you?

A. Well, I made the statement that it would be used against me. For instance, that I might have had a conversation with some one, I might have been in Washington at a certain time—all of those things could be used against me innocently.

Mr. O'Hara: Excuse me, do I understand this was said before the grand jury?

The Court: The Witness is giving the operation of his mind.

The Witness: That was my reason.

Q. Incidentally, while I go through this, were you shown

the letter before the grand jury from the Pattullo people in effect waiving any privileges they might have?

A. Yes.

Q. Between you and them?

A. I was shown such a letter, right.

Q. Was that read into the record of the grand jury?

A. It was read into the record of the grand jury.

Q. 298 and 299?

A. Yes.

The Court: That was the privilege between attorney and client.

The Witness: Yes, that is right.

Q. Page 1064: In response to some question: "I still have to protect my own constitutional rights, Mr. Kennedy. After all a Grand Jury is an *ex parte* proceeding. I haven't the right to cross examine any witnesses."

A. I said that to Mr. Kennedy.

Q. You rely upon this testimony?

A. I certainly do. It is authentic.

[fol. 723] Q. Now, Mr. Halperin, you told the truth on this witness stand as best you know how?

A. I told the absolute truth.

Q. Do you have any recollection, definite recollection of the days, of the exact words used at different times?

A. No, I have not.

Mr. Singer: May I have that Exhibit 37 please?

Q. You were asked some questions here about Mr. Ronayne and his capabilities as a lawyer on cross examination.

A. Yes.

Q. You never read Exhibit 37, did you?

The Court: You had better show it to the witness and find out.

Mr. Singer: It was offered here in evidence at the trial. It is Mr. Kuehl's private report.

The Witness: No, I have not.

The Court: Have you ever read that?

The Witness: No, sir, your Honor.

Q. You haven't read it during the trial either, have you?

A. No, sir, I have not. No, sir.

Mr. Singer: May I read on this one subject just one phrase?

The Court: Whose report is this?

Mr. Singer: Mr. Kuehl's, and I am reading the last paragraph on the bottom of page 4:

In order to prove that overceiling receipts were used for overceiling purchases the taxpayer's representative submitted various memoranda and checks which were not previously submitted to Special Agent Mullenbach on the advice of their former counsel.

By Mr. Singer:

Q. Do you know what that means, Mr. Halperin?

A. I certainly do.

[fol. 724] Q. That is the evidence——

Mr. O'Hara: No, no.

Mr. Singer: All right.

The Court: Ask the question.

Q. You were asked here, in substance you were asked whether you were smarter than Mr. Ronayne? Something like that? As a matter of fact it appears, does it not, that Mr. Ronayne didn't permit this evidence to be submitted?

Mr. O'Hara: I object.

The Court: Objection sustained. That is improper.

Mr. Singer: I respectfully except.

The Court: The form of the question.

Mr. Singer: From a reading of Exhibit 37 it appears——

Mr. O'Hara: The exhibit speaks for itself.

The Court: The exhibit speaks for itself. Don't put words in the mouth of the witness.

Q. Did you advise or was there any discussion in your presence that this proof should be submitted?

A. Absolutely. It was really new evidence.

Q. Didn't you say in substance it was not a question of law; it was simply a question of common sense?

A. I said it was a question of evidence and common sense. It certainly didn't involve any tax law.

Q. You don't pretend to know any more tax law or as much as Mr. Ronayne, do you?

A. No, I think I know about what the average lawyer knows in tax law that is not an expert.

Q. All right. Now, Mr. O'Hara in his last series of questions discussed certain testimony and in each instance you said that what these witnesses had said was incorrect. Is that true?

A. That is right.

[fol. 725] RENEWAL OF MOTIONS AND DENIAL THEREOF

The Court: I may say on these motions, it seems to me that so far as any argument is concerned, we had most of that all one afternoon at the end of the Government's case, so these are the formal motions you are making, and I see no necessity for any great deal of argument.

Mr. Bennett: I agree with your Honor. After all the time we put in on them that afternoon, there is no need to cover the ground again, and I simply want at this time, on behalf of the defendant Grunewald, to renew all the motions that I made at the conclusion of the Government's case with respect to Count 1, which is the only count now remaining against that defendant, including the motion to strike and the motion for judgment of acquittal.

I renew those made at the close of the Government's case, and I renew them now on the basis of the entire case.

I think that is all I have to say to your Honor. Your Honor has all the points in mind, and there is no need of my re-stating them.

The Court: Thank you. Your motions are denied, and you have an exception.

Mr. Singer: On behalf of the defendant Halperin, I renew each and every motion made at the close of the Government's case as if I had repeated in *haec verba* at this time.

I also move for a directed judgment of acquittal upon the ground that it now appears at the close of the entire case that no question of fact is presented sufficient to warrant its submission to the jury.

I further move for a directed judgment of acquittal upon the ground that the Government has failed to etsablish the

allegations of Counts 1, 5, 6 and 7 against the defendant Halperin.

I further move and renew my motions to dismiss the indictment upon the grounds that I urged with respect to [fol. 726] Halperin's grand jury testimony before your Honor this morning without repeating the language, but asking that the Court consider it as if I had repeated it.

I also move for the withdrawal of a juror and the declaration of a mistrial. I renew that motion upon the grounds in connection with that grand jury testimony which I gave to your Honor this morning.

I further move for a directed judgment of acquittal upon the ground of the statute of limitations and all of the other grounds we urged at the close of the Government's case as if they were renewed now at the close of the entire case.

The Court: Your motions are denied and you have an exception.

Mr. Singer: Exception.

Mr. Corbin: May the exceptions inure to the benefit of all defendants?

The Court: Yes, certainly.

Mr. Singer: In these motions, may we all have the benefit of the motions made by any other defendant where they in any way relate to our clients?

The Court: I see no reason why you shouldn't, do you, Mr. MacMahon? As far as I am concerned, you have the benefit of them.

Mr. MacMahon: None, your Honor, except that it leaves it rather wide and broad and a little difficult to tell what they are moving on.

The Court: I found that, too, but if I am wrong, everybody may take advantage of the exception.

* * * * * * *

The Court: I think I could advise the jury as to those overt acts which have not been established.

Mr. MacMahon: We have no objection to your Honor instructing the jury that that has been withdrawn from their consideration.

[fol. 727] Mr. Singer: That is what I am about to ask.

I ask your Honor that your Honor withdraw from the consideration of the jury overt act No. 10.

The Court: Let me ask Mr. MacMahon: Is there any objection to withdrawing from the consideration of the jury overt act No. 10 of the first count of the indictment?

Mr. MacMahon: No, your Honor, I think that is a matter of credibility. He was asked that question on cross examination. He denied it. That is true. The Government is in no sense bound by his answer. The jury is free to disbelieve him.

The Court: Is there any proof at all that there was such a conversation?

Mr. MacMahon: No; there is none other than that.

The Court: Well, I doubt very much then if there is anything for the jury to consider on that.

Mr. Singer: I ask to have withdrawn from the consideration of the jury overt act No. 12.

I ask that overt act No. 13 be withdrawn from consideration of the jury. There has been no proof offered of that at all.

The Court: I should think that was correct, too.

Mr. MacMahon: Yes, your Honor.

* * * * * * *

New York, March 22, 1955:
10:30 o'clock a. m.

Trial resumed.

REQUESTS TO CHARGE AND RULINGS THEREON

(The following proceedings were had in the robing room out of the presence of the jury:)

The Court: I stated at the close of the session yesterday afternoon that in accordance with the rules I would indi- [fol. 728] cate what action I would take on the several requests to charge this morning before the summations started. I appreciate the long and voluminous requests to charge which have been submitted by the five counsel in this case. I might say that in a case such as this where there are five counsel, all of them submitting voluminous requests

to charge, it is impossible to charge in the language of all five. A number of proposed charges cover simply general matters which I think the Court will cover completely in its charge. Some of the requests to charge are phrased in language which seems to be more appropriate to a summation than to a request to charge.

I am going to state specifically what requests I am denying. As to the other requests which I do not so state, I will deny them in the form stated in the requests to charge. I think the essential points will be covered in my charge.

I will pass first upon the requests to charge submitted by Mr. Corbin:

I deny request No. 16. I deny request No. 20, particularly in the form stated. I deny request No. 21. I deny request No. 22, particularly in the form stated. I deny request No. 23, particularly in the form stated. I deny request No. 25, particularly in the form stated. I deny request No. 27. I deny request No. 35, particularly in the form stated. I deny request No. 37. I deny request No. 39. I deny request No. 42 and 43.

As to the other requests to charge I deny them in the form in which they are stated.

I will now take up Mr. Singer's requests to charge——

Mr. Singer: Have you covered the additional requests?

The Court: Yes. I deny requests of Mr. Corbin, 53 through 56, inclusive, in the form in which they are stated in the proposed requests to charge.

Mr. Bennett: Exception, of course.

The Court: As to the requests to charge submitted by Mr. Singer on behalf of Max Halperin I rule as follows: [fol. 729] I deny requests 1, 2, 3, 4, 5, 6, 9, 11, 14 and 17. I particularly deny requests 12, 13, and 16 in the form in which they are stated.

All other requests to charge are denied in the form stated.

Mr. Singer: To which I specifically except.

* * * * * *

The Court: Exception is taken by everybody to all the charges submitted by one and all.

* * * * * *

Mr. Singer: In regard to the subject that I decided, and then I heard what he said, I wanted to give your Honor three requests to charge which I have written out. If you would rather I submit them to you in typewritten form at the same time that——

The Court: You gave me two this morning.

Mr. Singer: And I have three additional requests on Exhibits 66 to 70. If you would rather that I have them typed and brought over, I will have them brought over here by 10 o'clock Monday morning.

I wonder if you can read my writing here (handing to the Court).

The Court: Your additional requests to charge 21 and 23 are denied on the ground that it is a matter upon which the jury will have to conclude from the testimony.

On request No. 22, I think you have argued the matter to the jury, and I am not going in this case to charge the jury on every little bit of evidence. It would be impossible to do so. Therefore, I deny request No. 22.

Mr. Singer: I respectfully except.

* * * * *

The Court: I have received additional requests to charge from Mr. Singer, 21 through 27 inclusive. Those I deny in the form stated.

[fol. 730] Mr. Singer: I respectfully except. There was some requests that I had submitted before this. You said you had not passed on those.

The Court: You mean the pen and ink ones?

Mr. ~~Singer: No.~~ The pen and ink ones are identical with those, but there were four requests prior to this that I had submitted and you told me the other day you had not passed on.

The Court: They are not the same as these?

Mr. Singer: No.

The Court: The same as 24 through 27?

Mr. Singer: No. They were in different language, but probably on the same subject.

The Court: They were on the subject——

Mr. Singer: Of failure to call witnesses.

Mr. Court: Well, I deny those in the form stated.

Mr. Singer: Exception.

* * * * * * *

CHARGE OF THE COURT

The Court: Ladies and gentlemen of the jury: Before proceeding with my charge I should like first to extend to you and to each of you my appreciation for your attentiveness during the course of this long trial. I want particularly to express the gratitude of the Court for the sacrifice which each of you has made in neglecting your businesses and your personal affairs so that justice can be administered. I have never seen a jury which has followed a case more attentively, has been more prompt in attendance at the sessions, and has shown a greater devotion to this important duty of citizenship. Justice cannot flourish under our American system of jurisprudence unless all of us—you and I—are ready to make some sacrifices to attain the desired end. You have shown your willingness to assume this important task of citizenship, and your [fol. 731] service as jurors has been a graphic indication that each and every one of you takes seriously your duties as citizens of our great Republic.

I think you realize that, as jurors, you perform a very vital function in the administration of justice. As jurors, you are not just average citizens. You are sworn officials of the Court charged with certain duties and obligations in the administration of justice. You have taken an oath to render a true verdict on the evidence, and in your selection, I endeavored, by the questions that were presented to you, to be certain of the fact that both the government and the defense would receive a fair and impartial trial.

Now, as you approach the performance of your duties as jurors—the meting out of justice—I must remind you again that it is your duty to weigh the evidence in this case calmly and dispassionately, without sympathy or prejudice, either for or against the government or the defense.

The first thing I want to make clear to you is the way in which our American system of jurisprudence defines the duties of the judge on the one hand, and those of the jury on the other. Since you are not lawyers, it is exclusively the function of the judge to set forth the statutes and the rules of law which govern the case, with instructions as

to their application. On those legal matters, you must take the law as I give it to you; you are not at liberty to do otherwise.

Just as I am the exclusive judge of the law, so you, the members of the jury, are the exclusive judges of the facts, and you alone determine the weight, the effect and value of the evidence, and the credibility of the witnesses.

In this connection, you must remember that it is not what counsel for either the defendants or the government says is the evidence, nor what I say is the evidence, which will be determinative. It is your memory of the evidence which must govern you in the determination of the issues in this case.

[fol. 732] There are twelve jurors who will ultimately receive this case. If there is any question in your mind, or if you have any division of opinion, as to what a witness may have testified to concerning any particular incident, or if you cannot depend on your recollection of the facts which you think are vital, you may have the testimony read back to you pertaining to this particular incident. You have the right to have your recollection refreshed by requesting that that part of the witness's testimony be read to you here in the courtroom, and the stenographer will do so.

As you proceed on your deliberations, please be careful to listen to the opinions of other jurors, as well as to ask for an opportunity to express your own views. No one juror should hold the center of the stage in the juryroom or monopolize the deliberations. You all have a chance to express your views, but do not be afraid to change your view because of pride of opinion if you are convinced by argument and after due consideration that your original view is wrong. Talk the matter out. That is what deliberation means.

You will endeavor to arrive at a verdict, provided that this can be done reasonably and consistently with the conscientious convictions of each one of the jurors. It is important to both the government and to the defendants that this case be determined.

You understand, of course, that under our system of Federal law in a criminal case, any verdict of a jury must be a unanimous verdict. A ten to two verdict or a nine to three verdict is not any good.

So much for what your functions are and how you are to go about your work in the juryroom.

You are sitting in this case to determine the guilt or innocence of each one of five defendants on the charges contained in the indictment. As I told you at the time you were being selected as jurors, you are to draw no inference from the mere filing of an indictment. An indictment is merely an accusation. It is not evidence. It is the means [fol. 733] by which the defendant is advised of the charges which he has to meet. You will make your determination on the evidence which has been received in open court.

There were originally seven counts in the indictment. The third and fourth counts of the indictment have been dismissed. The fifth, sixth and seventh counts of the indictment have been dismissed as to all of the defendants except the defendant Halperin. Therefore, you will render a verdict on count one of the indictment as to the guilt or innocence of each of the five defendants who are on trial: Messrs. Grunewald, Bolich, Steinberg, Scherm, and Halperin.

The second count of the indictment charges the particular alleged crime therein referred to only as against the defendants Bolich, Steinberg and Scherm. Therefore, on the second count of the indictment, you will render a verdict as to these three defendants.

The third and fourth counts of the indictment, as I have said before, have been dismissed. The fifth, sixth and seventh counts of the indictment have been dismissed as against all the defendants except Halperin, and, therefore, on those counts you will render a verdict only as to the defendant Halperin.

You must draw no inference as to the guilt or innocence of the defendants under the remaining counts from the fact that several of the counts have been dismissed. The dismissals presented questions of law for the Court, and do not concern the jury.

In the original indictment, there were also named as defendants Milton Hoffman, Irving Davis, and Samuel Schopick; but, as you have previously been advised, the trial has been severed as against those defendants and their guilt or innocence will not be determined by you but as a result of another trial. Further, the fact that

certain alleged co-conspirators may have pleaded guilty to crimes essentially the same as those charged in the indict-
[fol. 734] ment does not create any presumption that the defendants now on trial are guilty.

I will, in the course of my charge, outline to you the charges in the several counts of the indictment and the law applicable to each of those charges. This law you will apply in reaching your determination as to the guilt or innocence of the defendants on the particular charges in the indictment.

The defendants have no burden of proof to sustain in this case. They are presumed to be innocent, and this presumption continues throughout the trial and during the deliberations of the jury. This presumption is overcome when, and only when, the government establishes the guilt of a defendant beyond a reasonable doubt.

The burden is on the government, as the one bringing the charge, to establish the guilt of the defendant beyond a reasonable doubt.

You may ask yourself what is meant by a reasonable doubt. There is nothing mysterious about the term. It means, as the words themselves indicate, a doubt based upon reason. It does not mean a capricious or a silly doubt. It does not mean a doubt which might arise because the jury does not wish to perform an unpleasant duty. The phrase "reasonable doubt" means precisely what it says—a doubt that is based on reason.

Proof in most cases is not a matter of mathematical or absolute certainty. In the nature of things, it cannot be. Therefore, the burden of the government is not to establish the guilt of a defendant beyond any possible doubt. It is to establish the guilt of a defendant beyond any reasonable doubt.

Therefore, to sustain a conviction, there would have to be such proof as satisfies your reason as intelligent people beyond any reasonable doubt that a defendant is guilty. If you find that the evidence respecting the defendants or a defendant is as consistent with innocence as with guilt, or if you find that the evidence as to any defendant is not
[fol. 735] such as you can conclude, beyond a reasonable doubt, that the defendant is guilty of the charge contained in the particular count of the indictment, such defendant or

defendants should be acquitted. But, on the other hand, if you find that the law has been violated as charged and that you can so conclude, beyond a reasonable doubt, you should not hesitate because of sympathy or for any other reason to render a verdict of guilty as a clear warning to all that a crime of the character alleged may not be committed with impunity. The public is entitled to be assured of this.

Some of the evidence in this case is what may be called "circumstantial evidence". Circumstantial evidence consists of facts proved from which the jury may infer, by a process of reasoning, other facts which are sought to be established as true. Circumstantial evidence is good evidence and is entitled to such consideration as you may find it deserves, depending upon the inferences you think it necessary to draw from such evidence.

Different conclusions may be drawn from facts and circumstances in a case, whether proved by direct or circumstantial evidence. The prosecution asks you to draw one conclusion, while the defense asks you to draw another. It is for you to decide, and for you alone to decide, which conclusion you will draw.

It is obviously impossible to ascertain or prove directly what the operations of the minds of particular persons were. You cannot look into a person's mind and see what his intentions are or were; but a wise and intelligent consideration of the facts and circumstances shown by the evidence in any case enables us to infer with a reasonable degree of accuracy what another's intentions were in doing or not doing certain things. With a knowledge of definite acts, we may draw definite legal conclusions. In our everyday affairs, we are continually called upon to decide from actions of others what their intentions or purposes are; and experience has taught us that frequently actions speak [fol. 736] more clearly than spoken or written words. You may, therefore, rely in part on circumstantial evidence in determining the guilt or innocence of any of these defendants.

If all the circumstances taken together are consistent with any reasonable hypothesis which includes the innocence of a defendant, then the prosecution has not proved his guilt beyond a reasonable doubt, and you must acquit

him. On the other hand, if you find that all the circumstances established by the evidence in this case, taken together, satisfy you beyond a reasonable doubt of the guilt of a defendant, in accordance with these instructions, it is your duty to find such defendant guilty.

The first count of the indictment charges a criminal conspiracy. This count charges that this criminal conspiracy was one of which all five defendants, Henry W. Grunewald, Daniel A. Bolich, Max Steinberg, Harry T. Scherm, and Max Halperin were guilty. This first count of the indictment charges that these defendants violated a section of the statutes of the United States which is known as Section 371 of Title 18 of the United States Code, which reads as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy . . ."

then they shall be punished as provided in the statute.

For two or more persons to conspire, confederate or combine together to commit any offense against the United States or to defraud the United States is an offense of a grave character. It is almost always characterized by secrecy, rendering detection difficult and requiring much time for its discovery. Because of this, the statute has made a conspiracy to commit a crime a distinct offense from the crime itself. From the point of view of the law, there is danger to the public when two or more people [fol. 737] conspire to do something which is unlawful because, by virtue of the aggregation of numbers, the intent assumes a more formidable aspect to the public.

What is a conspiracy? A conspiracy may be defined as a combination of two or more persons, by concerted action, to accomplish a criminal and unlawful purpose, or some purpose not in itself unlawful or criminal, by criminal or unlawful means.

The gist of the offense is the unlawful combination or agreement to violate the law. As Mr. Justice Holmes said

many years ago: "A conspiracy is a partnership in criminal purposes."

However, it is not necessary, in order to constitute a conspiracy, that the two or more persons should meet together formally and enter into any explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be. When persons in fact enter into a conspiracy of this nature, much is left to unexpressed understanding. Conspirators do not put their agreements in writing, nor do they make public their plans. From the very nature of a conspiracy, it is almost invariably secret in its origin and execution.

In judging whether or not there was an unlawful conspiracy, you may judge the acts and conduct of the defendants and the persons who are charged in the indictment, which I will shortly read to you, as their co-conspirators.

It is sufficient to establish a conspiracy if you reach the conclusion, beyond a reasonable doubt, that the defendants, either alone or with others, impliedly or tacitly came to a mutual understanding, of the nature described in the indictment, to commit an offense against the United States or to defraud the United States, and that one or more of them committed an overt act in furtherance of the conspiracy. In other words, where an unlawful end is sought to be effected, and two or more persons actuated by the common purpose of accomplishing that end knowingly work to-
[fol. 738] gether in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although his part therein be a subordinate one or be executed at a remote distance from the other conspirators. All of the conspirators need not have originally conceived the conspiracy, or participated in its conception. Those who come in later, with knowledge of the aims and purposes of the conspiracy, and cooperate in the common effort to attain the unlawful results, become parties to the conspiracy. A conspiracy is not ended as long as the evidence shows an intent to continue it.

The offense is a crime when the unlawful agreement or combination is made and any single overt act to effect the object of the conspiracy is thereafter done by at least one

of the co-conspirators. The overt act essential to a conspiracy prosecution needs not be an act of all the conspirators, nor is it required that each conspirator participate therein, for the act of one conspirator done in furtherance of the conspiracy becomes the act of all, just as in our civil law, the act of one partner becomes the act of all the partners.

The proof of only one overt act, if committed by any of the conspirators during the course of the conspiracy, is sufficient. The overt act need not be criminal in nature if considered separate and apart from the conspiracy. It may be as innocent as the act of a man walking across the street or talking to another man or using a telephone. To be an overt act, however, it must be an act which tends to accomplish the plan or conspiracy and must be done in furtherance of the object or purpose of the conspiracy.

It is not necessary for the government to prove all of the overt acts alleged in the indictment. It is sufficient that the government prove any one of them, and that one of them took place within the period of the Statute of Limitations, which I will later explain to you.

Each alleged conspirator who is found to be a member of the conspiracy remains a member during all of its exist-
[fol. 739] ence, except that a conspirator has a right to withdraw from the execution of the conspiracy, but it requires affirmative and effective action thus to withdraw and terminate his liability in the conspiracy.

Persons may be guilty of being parties to a conspiracy though the objects of the conspiracy were never accomplished. On the other hand, proof concerning the accomplishment of the objects of a conspiracy is the most persuasive evidence of the existence of the conspiracy itself.

You are further instructed that where several persons are proved to have combined together for the same illegal purpose, any act or declaration made by one of them during the pendency of the illegal enterprise, and in furtherance of the common objects, is not only evidence against himself, but is evidence against the other conspirators who, if the conspiracy is proved, are as much responsible for such declarations and acts as if made by themselves.

Evidence as to the acts by one or more of those who

compose a conspiracy, if done in furtherance of it, is binding upon all of the conspirators, even if some of them may not have had specific knowledge of that particular act. But you are not to consider any of the acts of the alleged conspirators binding on any other defendant or as an overt act in pursuance of or to effect the object of the alleged conspiracy in the absence of a finding by you that both of them were parties to the alleged conspiracy.

So, also, you are not to consider any statements made by one conspirator with reference to another conspirator as admissible against that alleged conspirator unless and until you first find that both of such persons were parties to the alleged conspiracy at the time the statement was made.

With these general principles as a guide, you will approach the important question of whether the government has proved, beyond a reasonable doubt, first, the existence of the conspiracy alleged in the first count of the indictment; second, if such conspiracy did exist, whether [fol. 740] the defendants, or any of them, were parties to it and entered it with knowledge of its nature and purposes; and, third, whether an overt act to effect the object of the conspiracy was thereafter done by at least one of the co conspirators.

In considering whether or not a particular defendant was a member of a conspiracy, you must do so without regard to and independently of the statements and declarations of others. In other words, you must determine the membership of a defendant from the evidence concerning his own actions, his own conduct, his own declarations, his own statements, and his own connection with the actions and conduct of the others.

However, once you have determined that a defendant was a member of the conspiracy, using this test, you may then consider as if made by him the statements and declarations of other co-conspirators made in furtherance of the conspiracy and during the existence thereof.

Now, let us first consider what the first count of the indictment charges. I will read the substance of it to you:

"The Grand Jury charges:

"1. From on or about January 1, 1946, and continuously and at all times thereafter up to and includ

ing the date of this indictment, Henry W. Grunewald, Daniel A. Bolich, Max Steinberg, Harry T. Scherm and Max Halperin, hereinafter referred to as the defendants, in the Southern District of New York, did wilfully, knowingly, unlawfully and feloniously conspire, combine, confederate and agree together, each with the other, and with Milton Hoffman, Irving Davis, Samuel Schopick, Louis M. Berman, Philip Berman, Morton Marks, James A. Zipser, Samuel Cohen, Marjorie Zipser Segel, and Maurice Smith, named as co-conspirators but not indicted herein, and with divers other persons to the grand jury unknown to defraud the United States in the exercise of its governmental [fol. 741] functions of administering the internal revenue laws and of detecting and prosecuting violations of the internal revenue laws free from bribery, unlawful impairment, obstruction, improper influence, dishonesty, fraud and corruption, and its right and interest in the conscientious, honest and faithful services, judgments, determinations and actions of the defendants Daniel A. Bolich, Max Steinberg, Harry T. Scherm, duly appointed employees of the Bureau of Internal Revenue and the Internal Revenue Service of the United States Treasury Department (said Bureau and Service hereinafter referred to as the Bureau), free from bribery, corruption, improper influence, dishonesty, bias, hope of unlawful reward and fraud, and to commit certain offenses against the United States, to wit, corruptly to endeavor to influence, intimidate and impede witnesses in a court of the United States, to wit, witnesses in the District Court of the United States for the Eastern District of New York, and the Grand Jury thereof, and corruptly to influence, obstruct and impede the due administration of justice therein, in violation of Title 18, United States Code, Section 1503; and corruptly to endeavor to influence, intimidate, and impede witnesses in connection with an inquiry and investigation being had by a committee of the House of the Congress, to wit, witnesses before the Committee on Ways and Means of the United States House of Representatives, and corruptly to

influence, obstruct, and impede the due and proper exercise of the power of inquiry under which said inquiry and investigation was being had by said Committee, in violation of Title 18, United States Code, Section 1505; and to commit perjury in violation of Title 18, United States Code, Section 1621.".

Now I am not going to read the entire indictment. You will have it with you in the juryroom, but I will read to
fol. 742] you the sections which say what the part of the conspiracy was: Sections 7, 8, 9, 10, 11, 12 and 13.

Paragraph 7:

"It was a part of the conspiracy that the defendants and co-conspirators would make continuing efforts to avoid detection and prosecution by any governmental body, executive, legislative and judicial, of tax frauds perpetrated by the defendants and co-conspirators, through the use of any means whatsoever, including, but not limited to, bribery, improper influence and corruption of government employees, the giving of false testimony, the influencing, intimidating and impeding of prospective witnesses to refrain from disclosing the true facts, obstruction of justice, and the presentation of false and fraudulent affidavits, statements and documents to the aforesaid Bureau.

"8. It was further a part of the conspiracy that the defendants and co-conspirators Irving Davis, Milton Hoffman and Samuel Schopick would represent and cause to be represented to various persons that they and the law firm of Schopick & Davis were specialists in income tax matters and that they had connections and influence with the Bureau of Internal Revenue in New York City and Washington, D. C., and could obtain for taxpayers special advantages and preferential treatment and consideration from said Bureau and were able to influence officers and employees of the Bureau of Internal Revenue to make favorable dispositions of tax matters pending within the said Bureau, regardless of the merits thereof.

"9. It was further a part of the conspiracy that the defendants Max Steinberg and Harry T. Scherm

would use their positions as officers and employees of the Bureau of Internal Revenue to impress upon various persons the connections and ability of the law firm [fol. 743] of Schopick & Davis to procure favorable dispositions of tax matters pending within the said Bureau, regardless of the merits thereof.

"10. It was further a part of the conspiracy that the defendants and co-conspirators Irving Davis, Milton Hoffman and Samuel Schopick would obtain sums of money to procure corrupt dispositions of tax matters then pending within the said Bureau.

"11. It was further a part of the conspiracy that the defendants Daniel A. Bolich, Max Steinberg and Harry T. Scherm, in their capacities as officers and employees of the said Bureau, would corruptly render decisions and corruptly take actions with respect to matters, investigations and criminal proceedings pending before the said defendants in their official capacities and within the said Bureau.

"12. It was further a part of the conspiracy that the defendants and co-conspirators would make and cause to be made false and fraudulent affidavits, claims, documents, statements and depositions and cause the same to be presented to the Bureau of Internal Revenue in connection with the tax matters then pending within the said Bureau.

"13. It was further a part of the conspiracy that the defendants and co-conspirators at all times would misrepresent, conceal and hide and cause to be misrepresented, concealed and hidden, the acts done pursuant to and the purposes of said conspiracy.

"14. It was further a part of the conspiracy that the defendants and co-conspirators would misrepresent, and conceal and cause to be misrepresented and concealed the acts done pursuant to the conspiracy and the true nature of the conspiracy by any means whatsoever, including but not limited to, the influencing, intimidating and impeding of prospective witnesses to [fol. 744] refrain from disclosing the true facts, obstruction of justice, bribery, and the giving of false testimony whenever and wherever it was sought by any

governmental body, executive, legislative and judicial, to detect and prove the existence of the conspiracy."

With respect to Count One of the indictment, I charge you that but a single conspiracy is alleged, although it refers to (a) conspiring to defraud the United States; (b) conspiring to endeavor corruptly to influence witnesses in a court of the United States; (c) conspiring to endeavor corruptly to influence witnesses in connection with an inquiry or investigation being had by a committee of a House of the Congress; and (d) conspiring to commit perjury. I repeat: Although the alleged conspiracy thus has four objects, it charges a single conspiracy.

Now, when only a single conspiracy is alleged, the government does not have to prove, in order to permit the jury to render a verdict of guilty, that the defendants conspired to do everything that they are alleged to have conspired to do. It is sufficient for the government to prove that they conspired to do any one of the things alleged, which, by itself, would be a violation of the statute, and that an overt act in pursuance of the conspiracy was done within the period of the Statute of Limitations.

You have heard the testimony of Milton Hoffman, Irving Davis, Louis M. Berman, Morton Marks, Marjorie Segel and Maurice Smith who are named as co-conspirators in the indictment, but not indicted therein, concerning agreements made between them, or some of them, to effect an escape from criminal prosecution for an admitted tax fraud perpetrated by some of them and by corporations with which they were associated. Now, the question of fact which you will have to determine beyond a reasonable doubt is whether the defendants became parties to this conspiracy knowing the objectives of the conspiracy. You will recall [fol. 745] that the indictment charges that one of the purposes of the conspiracy was "to defraud the United States in the exercise of its governmental functions and administering the internal revenue laws and of detecting and prosecuting violations of the internal revenue laws free from bribery, unlawful impairment, obstruction, improper influence, dishonesty, fraud and corruption . . ."

You will note that the language of the conspiracy statute forbids a conspiracy to defraud the United States in any

manner or for any purpose. It has been decided by the courts that this phrase "defraud the United States in any manner or for any purpose" is not limited merely to conspiracies to defraud the United States of money or of property or things of pecuniary value, but that it also means any interference or obstruction with the lawful governmental function of the Federal Government by deceit, trickery, or corruption. In this case, the government charges that the conspiracy alleged in Count One of the indictment was to defraud the United States in the exercise of its governmental function of administering the internal revenue laws and of detecting and prosecuting violations of the internal revenue laws free from bribery, unlawful impairment, obstruction, improper influence, dishonesty, fraud and corruption. The administration of the internal revenue laws and of the laws for the detection and prosecution of violations of internal revenue laws are, of course, Federal governmental functions.

The statutes of the United States impose certain duties upon revenue officers and agents. The law makes it a criminal offense for such an agent or representative in the service of the Bureau of Internal Revenue to demand or accept, directly or indirectly,

> "as payment or gift, or otherwise, any sum of money or other thing of value for the compromise, adjustment, or settlement of any charge or complaint for any violation or alleged violation of law . . ."

[fol. 746] It makes it a criminal offense for any revenue agent to make an opportunity for any person to defraud the United States, or to conspire or collude with any other person to defraud the United States.

Now, you have heard the testimony presented by the government in this case that certain officers and stockholders of Pattullo-Modes, Inc., of Gotham Beef Company and of Gotham Ship Purveyors, Inc., who admittedly had been guilty of fraud in connection with income tax matters, being concerned about the possibility of criminal prosecution for that fraud, retained the firm of Schopick & Davis; that, thereafter, while the matter was pending in the Special Agent's office of the Bureau of Internal Revenue, Mr. Davis

introduced to his clients the defendant Halperin who was sharing offices with him and stated that Mr. Halperin had a friend in Washington who could be of assistance. You have heard testimony of Mr. Hoffman and Mr. Davis of Mr. Halperin's trips to Washington, of how, while there, he met and talked with the defendant Grunewald.

You have heard the testimony of Mr. Davis and Mr. Hoffman that Mr. Halperin reported that the matter could be settled without criminal prosecution if $100,00 was paid to Mr. Grunewald. You have heard the testimony of Mr. Davis that Mr. Grunewald indicated, in the presence of Mr. Halperin and Mr. Davis, that $100,000 would be a satisfactory amount to him in the Pattullo Modes case. You have heard the testimony of certain stockholders of Pattullo Modes, Inc. as to how they collected $100,000 in cash; of how it was taken to the office of Mr. Davis and handed to Mr. Halperin for deposit in a safe deposit box. You have heard the testimony of Mr. Hoffman that after the Pattullo Modes people had been advised that there would be no criminal prosecution, he, Halperin and Davis went to the safe deposit box and took out the money; that the money was counted in their presence, placed in two bags or brief cases, and that Mr. Hoffman accompanied Mr. Halperin to Washington, and that they handed over these bags or brief-[fol. 747] cases to Mr. Grunewald at the railroad station in Washington.

You have heard the testimony of Mr. Berman of the Gotham Beef Company as to how he gathered together in two installments the total sum of $60,000; how these amounts were delivered to Mr. Halperin and Mr. Greenstein; how at least one of these amounts was deposited in a safe deposit box; how, thereafter, the box was released to Mr. Halperin after the Gotham Beef Company people had been advised that there would be no criminal prosecution.

You have heard testimony that the defendant Bolich, who was Assistant Commissioner of Internal Revenue of the United States, was a close friend of the defendant Grunewald; that Bolich lived in a hotel suite in Washington which the defendant Grunewald used as an office or place of business, and that they were frequently seen together. You have heard the testimony of Davis as to a conversation

with Grunewald about $100,000 for the Pattullo Modes case. You have heard testimony of Grunewald's former secretary that Grunewald paid most of his bills in cash, and that he stated to her that people came to him on tax matters because he was able to fix them. You have heard testimony of Bolich's interest in, and actions concerning, the Gotham beef case.

You have heard testimony that the Pattullo Modes case was assigned for investigation to a Special Agent of the Bureau of Internal Revenue; that from the facts developed by him, he believed the case was one that properly might be recommended for criminal prosecution; that while the matter was still under investigation by him, the defendant Bolich in Washington told representatives of the taxpayers that if they cooperated with the Bureau, he would recommend that there be no criminal prosecution; that thereafter they cooperated to the extent of making available certain information books, and records to the Bureau and furnishing net worth statements to the Bureau. You have heard testimony that Mr. Baradel, who was in charge of the [fol. 748] Special Agent's office which was conducting the investigation, was told by Mr. Bolich that he had made a promise or commitment to the taxpayers that if they cooperated, there would be no prosecution; that Mr. Bolich, before making such promise or commitment, had not requested from the Special Agent's office any files or records in the case or any recommendations from the Special Agent's office; that in view of the commitment given by Mr. Bolich and the fact that the taxpayers had cooperated with the Bureau, Mr. Baradel and the Special Agent felt that it would no longer be possible to process the case for criminal prosecution and that the taxpayers were advised that the Bureau would not recommend that the matter be prosecuted criminally. You have heard the testimony that thereafter, the $100,000 was delivered to Mr. Grunewald.

You have also heard the testimony of Mr. Halperin who directly contradicts the testimony given by the government's witnesses. Mr. Halperin denied that there were any discussions by him with the representatives of Pattullo Modes and of Gotham Beef Company with reference to receiving money to be taken to a Washington representa-

tive to secure a determination that there would be no criminal prosecution. You have heard the testimony of Mr. Halperin that he never received $100,000 from either the representatives of Pattullo Modes or from Mr. Davis; that he never took $100,000 to Mr. Grunewald; that he never discussed any of these cases with Mr. Grunewald at all. You have also heard the testimony of Mr. Halperin that although a package believed by him to contain cash was delivered to him by the Gotham Beef people for deposit in a safe deposit box, taken out by him with Mr. Greenstein, to which each had access, and his statement that the money was deposited in such safe deposit box, but that he never knew what happened to the money; that he understood that the money was to be used to pay a fee in cash to some lawyer, but that he did not know the name of the lawyer and never inquired or was informed as to whom the money was [fol. 749] to be given or who actually received the money. You have, therefore, a direct conflict of testimony between Mr. Halperin and the witnesses for the government.

I have not attempted to summarize all of the evidence on this aspect of the case, nor shall I attempt to summarize all of the evidence on any other aspect of the case. In the very nature of things, in a case which has lasted for seven weeks, it would be impossible to summarize all of the evidence, and you must not take the references which I have made to the testimony as being a summary of all the important testimony, but rather in the nature of pointing up certain of the issues for you. The fact that any of the defendants did not take the stand and testify cannot be considered by you as any evidence against those defendants or against any of the other defendants, or as a basis of any presumption or inference unfavorable to him or to them. You must not permit such a fact to weigh in the slightest degree against such defendant. The defendants are not required under our law to establish their innocence. The burden at all times remains upon the government to establish the guilt of the defendants beyond a reasonable doubt.

You have, however, an issue of fact as to whether the acts concerning which there was testimony were acts pursuant to a conspiracy, and whether, in fact, there was a conspiracy between Davis, Hoffman, the Pattullo Modes

people, or the Gotham Beef Company people, and these defendants to fix tax cases so that there would be no criminal prosecution. That is a first issue in the case.

You will recall that the indictment states, among other things, that it was part of the conspiracy that the defendants and co-conspirators would make "continuing efforts to avoid detection and prosecution by any governmental body, executive, legislative, and judicial of tax frauds perpetrated by the defendants and co-conspirators, through the use of any means whatsoever including but not limited to . . . the influencing, intimidating, and impeding of prospective witnesses to refrain from disclosing the true facts." fol. 770. In other words, the indictment alleges that the conspiracy comprehended within it a conspiracy to conceal the true facts from investigation, should investigation thereafter eventuate. This is an important element of the first count of the indictment which you must take into consideration, inasmuch as the Statute of Limitations on the charge of criminal conspiracy is three years and unless the conspiracy was continuing to a period within three years prior to the date of the indictment, October 25, 1954, and some overt act was performed within that three-year period, the crime, if any, alleged in the first count of the indictment would be outlawed. It is the contention of the government that the conspiracy did not end when the taxpayers were advised that there would be no criminal prosecution recommended by the Special Agent's office, but that an integral part of the entire conspiracy was an agreement to conceal the acts of the conspirators and that when thereafter an investigation was started by Congress and by the Grand Jury in the Eastern District of New York, the conspirators performed overt acts in pursuance of the original conspiracy designed to conceal the true facts; and that these acts occurred within three years prior to the date of the indictment. On this issue, it will be necessary for you to determine whether, beyond a reasonable doubt, you can conclude that the conspiracy was of the nature described in the first count of the indictment and comprehended an agreement to conceal and whether some overt act took place in the period of three years prior to October 25, 1954 to carry out such purpose of the conspiracy.

You have heard testimony that in March, 1952 within that three-year period, Davis, Halperin, Schopick, and Hoffman discussed how they should handle the Brooklyn Grand Jury investigation when it started and how they should handle the clients. Mr. Halperin denied this. You have heard testimony that after Marks had been subpoenaed to appear before that Grand Jury, Davis said to [fol. 751] him: "You cannot talk. You would be crazy to talk." And again: "Morton, are you going to turn me in?" You will recall testimony of Mrs. Segel that after she had been subpoenaed before the Brooklyn Grand Jury, which was in this three-year period, Davis had talked to her and told her, in substance, that she should lie about the things which had been done wrong in the case.

You have also heard testimony that in February, 1952, which is again within the three-year period, Mr. Davis and Mr. Halperin saw Mr. Berman of the Gotham Beef Company and that Mr. Halperin said to Berman that he had done a good turn in the handling of the tax case and that he had asked Berman not to hurt him by talking in connection with the tax case now. Mr. Halperin has denied that any such conversation took place.

You have heard testimony from the girl who had been the defendant Grunewald's secretary that when she was subpoenaed before the Brooklyn Grand Jury, Grunewald talked to her on the telephone and indicated that she need not answer certain questions, and that she should answer questions by saying that she forgot.

Were these overt acts in pursuance of the conspiracy? An overt act is defined, as a matter of law, as any act done to effect the object of the conspiracy. To be an overt act, it must be in furtherance of the object of the conspiracy, although standing by itself, it need not be a criminal act. The Statute of Limitations does not begin to run on a conspiracy indictment until after the last overt act done by a co-conspirator to carry out an objective of a continuing conspiracy.

To determine whether certain of the alleged overt acts were in furtherance of the object of the conspiracy, you have to determine the duration of the conspiracy. Did it end when the Pattullo Modes people and the Gotham Beef people received an assurance of no prosecution from the

Bureau of Internal Revenue, or was a part of the conspiracy a continuing agreement to conceal the acts done [fol. 752] pursuant thereto? In determining whether a part of the conspiracy was an agreement to continue to conceal the illegal acts after their consummation, you may not imply that such an agreement was part of the conspiracy. You would have to find from the evidence of the acts and declarations of the co-conspirators that there was an understanding or agreement to conceal the conspiracy. If you find that such an agreement or understanding to conceal the conspiracy was not a part of the conspiracy to defraud the government, but no more than an afterthought brought to the surface when the co-conspirators were confronted with the Grand Jury and King Committee investigations, then you must find, as a matter of law, that the defendants are not guilty of the crime charged in the first count of the indictment. If you find that the evidence shows, beyond a reasonable doubt, that as a part of a conspiracy to defraud the government, there was an agreement or understanding to conceal the illegal acts and that this too was an objective or part of the conspiracy, then you may find that such understanding was a part of the conspiracy. However, you must additionally determine whether this objective of the conspiracy was known to the defendants. If this objective was known originally by only part of the conspirators but thereafter during the existence of the conspiracy, the scope of the conspiracy was extended so as to include such an agreement to conceal, and if you find that some of the defendants did not know of the expansion to include the agreement to conceal, you may not impute to them the knowledge of their co-conspirators and they could not be found guilty of the crime charged in Count One.

Now, therefore, as to the defendants Halperin, Grunewald, and Bolich, you have the questions of fact, first, as to whether they became parties to a conspiracy to defraud the United States, and that part of this conspiracy was to make continuing efforts to avoid detection and prosecution by any governmental body; second, whether they knew the general objectives of the conspiracy; and third, whether [fol. 753] any one of the conspirators took any overt act within three years prior to October 25, 1954 to accomplish

the result of that conspiracy. If you can answer these questions all in the affirmative, beyond a reasonable doubt, then you would be justified in returning a verdict of guilty on the first count of the indictment as against each one of these three defendants. If you cannot find that you can answer these questions in the affirmative, beyond a reasonable doubt, as to these three defendants, then as to the ones concerning whom you cannot so answer it, you should return a verdict of not guilty.

Now we come to the other two defendants named in the first count of the indictment. They are the defendants Max Steinberg and Harry T. Scherm. You have first of all the question as to whether they, or either of them, were parties to the conspiracy described in the first count of the indictment, and by that I mean that particular conspiracy and not some other separate or distinct conspiracy. This count of the indictment alleges that it was part of the conspiracy that the defendants Steinberg and Scherm would use their powers as officers and employees of the Bureau of Internal Revenue to impress upon various persons the connections and ability of the law firm of Schopick & Davis to procure favorable dispositions of tax matters pending with the said Bureau, regardless of the merits thereof. Was this a fact? Was that a part of the general conspiracy? You will recall the testimony that Mr. Steinberg was very friendly with Mr. Hoffman who was associated with the firm of Schopick & Davis; that he let Mr. Hoffman know that there was pending in his unit a matter involving possible charges of tax fraud against Pattullo Modes, Inc.; that at a meeting in an automobile with Mr. Hoffman and the accountant of Pattullo Modes, Inc., Mr. Steinberg indicated that the matter was still under control and on his desk and that he indicated later that he expected to be taken care of in the matter. There has been no testimony that Mr. Steinberg rendered any improper decision in [fol. 754] connection with this matter which would have prevented either criminal prosecution or the imposition of civil liability for taxes and penalties. We are not here concerned with the question as to whether Mr. Steinberg may have been indiscreet in his relationships with Mr. Hoffman or whether he may have violated some law or regulation in revealing to Mr. Hoffman the fact that he had some case

pending before him. That, if true, might be a separate offense. You will be concerned on the first count of the indictment with the question as to whether Mr. Steinberg was a party to a general conspiracy of the nature outlined in this count of the indictment. It would not be necessary that Mr. Steinberg know all the ramifications of the conspiracy for him to be found to be a party to the conspiracy. However, you cannot convict him as being a party to the conspiracy unless you can find that he joined in this conspiracy to defraud the United States in the exercise of its governmental functions of administering the internal revenue laws and in the right and interest of the government in the conscientious, honest and faithful services, judgments, determinations, and actions of the defendants who were members of the Bureau of Internal Revenue and in the conspiracy to conceal the acts of the conspirators. The question of fact which you will have to determine as to Mr. Steinberg, therefore, is whether he knowingly joined in or became a participant in any such conspiracy. You have the same question of fact to determine with reference to the defendant Scherm. You will recall the testimony with reference to Mr. Scherm. You will recall that he was the revenue agent who made the initial reports on this matter. You will recall that after the principals in Pattullo Modes, Inc. had been advised there would be no criminal prosecution, it was the defendant Scherm, together with Special Representative Clayton, who undertook the determination of the question of civil liability and taxes. You will recall the testimony that Mr. Davis stated to principals in Pattullo Modes, Inc. that it would be necessary to provide some [fol. 755] money for the "boys in New York"; that thereafter, a sum of money was gathered together in cash which Mr. Marks said was either $25,000 or $40,000 and which was put in a box and delivered to the office of Mr. Davis. You will recall the testimony of Mr. Hoffman that he delivered such a box to Mr. Scherm although he had not seen the contents of the box. Mr. Scherm took the stand and denied that he had received any such money or, in fact, any money at all.

You will recall also that Mr. Marks and Mrs. Segel stated that they had completely forgotten all about this $40,000 payment when they formerly testified in connection with

these matters and, in fact, had completely forgotten about it until within the last few months. There has been no proof that Mr. Scherm did anything improper or illegal in any of his determinations of matters before him in connection with the tax adjustments. You will, therefore, have two questions to determine with reference to Mr. Scherm: first, if the acts concerning which testimony was given were true, were they done by Mr. Scherm as part of the conspiracy alleged in the indictment? If they were individual acts on his part and not done pursuant to a conspiracy of the nature described in the indictment, then no matter how wrong those acts were, Mr. Scherm cannot be convicted on the first count of the indictment. You will have to decide, as a second point, if you believe that Mr. Scherm was a party to the conspiracy, whether you believe that the government has proved, beyond a reasonable doubt, that the payments were made and received by Mr. Scherm to influence his judgment.

It is not necessary for the government to establish that any decision by any of the defendants who were revenue agents was wrong as a matter of law or regulations. The crime charged in the indictment becomes complete the instant the conspiracy was formed, provided only that there can be no prosecution unless followed by some overt act, no matter whether the object of the conspiracy was consummated or, if consummated, whether the result of any [fol. 756] determinations made by the revenue agents was correct or incorrect as a matter of law or otherwise. Action by governmental officials, whether just or unjust, right or wrong, is not for sale; and if money was paid to influence an action of a revenue agent, it is no defense that the action finally taken by him was a correct action or that he would have taken the same action or reached the same determination even if no money had been paid.

Moreover, you must bear in mind that you are not sitting here in judgment upon matters of policy in the administration of the internal revenue laws, nor to determine whether any determination reached by Scherm, Steinberg or Bolich was prudent or proper. As jurors, you are to determine whether any action taken by them, whether proper or improper, was taken wilfully, knowingly and corruptly

as a member of this alleged conspiracy and with the object of furthering its purpose and carrying it into execution.

The first count of the indictment alleges thirteen overt acts alleged to have been performed by one or more of the conspirators in pursuance of the conspiracy. There has been no evidence of overt acts which are numbered "10", "12", and "13" in the indictment. Overt acts numbers "7", "8", "9" and "11" are alleged to have taken place within three years prior to the date of the indictment. For example, overt act number "9" alleges that on March 7, 1952, co-conspirator Samuel Schopick had a conversation with co-conspirator Maurice Smith. You will recall that Mr. Smith testified that on or about that date, Mr. Schopick told him that in his appearance before the grand jury, he was to change his testimony as to the check of $500 that he had given to Mr. Deutsch.

Overt act number "11" alleges that between March 11, 1952 and March 31, 1952, within that three-year period before the date of the indictment, the defendant Max Halperin had a conversation with co-conspirator Louis Berman and with Monroe Tobias. You will recall the testi- [fol. 757] mony of these men as to a conversation with Mr. Halperin, which Mr. Halperin has denied, relating to the testimony which they were to give before the grand jury.

As I have previously indicated, it would be necessary for the government to establish only one overt act within the period of three years before the date of the indictment; but in order for you to convict, it would be necessary for you to determine, beyond a reasonable doubt, that some such overt act did take place within that period, that it was an overt act in pursuance of the objective of the conspiracy, and that this objective of the conspiracy was known to the defendants.

We now come to the second count of the indictment. While this second count of the indictment has certain similarities to the first count of the indictment, it is alleged separately because the crime therein alleged is a separate crime from that alleged in the first count of the indictment. The only defendants named in the second count of the indictment are Bolich, Steinberg and Scherm, who are alleged to have been in the Internal Revenue Service of the United States. As you will recall, the first count of the indictment

included these three defendants and also the defendants Halperin and Grunewald. The first count of the indictment charged a violation of a statute of the United States, which makes it a criminal offense to conspire to commit any offense against the United States or to defraud the United States.

The second count of the indictment charges a violation of Section 4047(e)(4) of the Internal Revenue Code which makes it a crime specifically for a revenue officer or agent to conspire to collude with any other person to defraud the United States, and provides that any revenue officer or agent who does so shall be punished as provided in that particular section of the statute. In other words, an internal revenue officer or agent who enters into such a conspiracy may be found guilty not alone of a violation of the general statute against criminal conspiracies but also of this par- [fol. 758] ticular provision of the Internal Revenue Code. Under this particular section of the statute, it is not necessary that the government prove any overt act. The Statute of Limitations is five years and not three years. The evidence has shown that Bolich, Steinberg and Scherm were internal revenue officers or agents within the meaning of the Internal Revenue Code.

The second count of the indictment alleges in substance a conspiracy similar to the previous conspiracy. I will not read it to you, but you will have the indictment in there. It alleges that the conspiracy was one in which these three officers or representatives of the Bureau of Internal Revenue participated, and that, therefore, they were guilty of this separate crime provided by the Internal Revenue Code in addition to any crime of which they may have been guilty under the first count of the indictment.

In order to return a verdict of guilty as to any defendant named in the second count of the indictment, you must find, beyond a reasonable doubt, that he was an officer or agent of the Bureau of Internal Revenue, and that while acting as such officer or agent, he became a member of the conspiracy to defraud the United States, as alleged in this count of the indictment.

I have already charged you as to the meaning of the term "conspiracy" with reference to count one. You may use that same definition in your consideration of this count.

In order to find these defendants guilty of the crime charged in this count of the indictment, you must find that they wilfully and knowingly conspired and agreed, as alleged in the indictment, to defraud the United States in the exercise of its governmental functions of administering the internal revenue laws and of detecting and prosecuting violations of the internal revenue laws free from unlawful impairment, bribery and corruption, and in its right and interest in the conscientious, honest and faithful services of these defendants as duly appointed employees of the Bureau of Internal Revenue.

[fol. 759] The governmental functions of the United States can be impaired in various ways. If any defendant, as an internal revenue agent, by his acts wilfully interfered with the due and impartial administration of the internal revenue laws, or corruptly administered such laws, or failed to give the United States his impartial, honest, faithful and conscientious services, free from bribery or corruption, that would be an impairment of the governmental functions of the United States and a fraud against the United States.

If any defendant, as an internal revenue agent or officer, demanded, accepted, or received, directly or indirectly, from any taxpayer sums of money to influence his judgment on a tax matter at that time pending before him, or if a private citizen conspired and agreed with a revenue agent to furnish him money or things of value, that would be an impairment of the governmental functions of the United States and a fraud against the United States.

The defendants are charged with unlawfully conspiring to accomplish those objects. It is not necessarily incumbent upon the prosecution to prove that all of the methods set out in that second count of the indictment were, in fact, agreed upon to carry out the conspiracy. It is sufficient, if established beyond a reasonable doubt, that one or more of the methods alleged in the indictment was agreed upon to be used to effect the conspiracy.

The Statute of Limitations on this count is five years; that is, the indictment must have been returned within five years of the commission of the crime. The indictment in this case was returned on October 25, 1954. Therefore, I charge you that to return a verdict of guilty as to any

defendant on this count, you must find from the evidence, beyond a reasonable doubt, that the defendant was a member of the conspiracy as alleged in this count on and after October 25, 1949, and that he was an official of the Bureau of Internal Revenue at such time.

Now, again, this count of the indictment alleges that it was part of such conspiracy that the defendants and [fol. 760] co-conspirators would make continuing efforts to avoid detection and prosecution by any governmental body, Executive, Legislative and Judicial, of tax frauds, perpetrated by the defendants and co-conspirators; and it was part of such conspiracy to conceal the acts done pursuant to the conspiracy by any means whatsoever, including the influencing, intimidating and impeding of prospective witnesses to refrain from disclosing the true facts.

If, therefore, you find that you can conclude, beyond a reasonable doubt, from the evidence in this case, that the defendants named in the second count of the indictment, were parties to the conspiracy therein alleged and were internal revenue officers or agents, and that part of this conspiracy was to make continuing efforts to avoid detection and prosecution through, among other things, the influencing of prospective witnesses to refrain from disclosing the true facts, and that one or more of the conspirators, in the course of the conspiracy, took some act looking toward the objective of the conspiracy within five years prior to October 25, 1954, you may find that the three defendants, or such of them as you find, beyond a reasonable doubt, were parties to this particular conspiracy, guilty also of the crime charged in the second count of the indictment.

If you do not find that you can so conclude, beyond a reasonable doubt, as to the defendants, or any of them, named in the second count of the indictment, you should acquit them.

We now come to the three remaining counts of the indictment.

Counts Five, Six and Seven charge the defendant Halperin with violating Section 1503 of Title 18 of the United States Code. You will disregard any allegations in those counts of the indictment relating to other defendants. In those counts Five, Six and Seven, you are to be concerned

solely with the guilt or innocence of the defendant Halperin.

As here pertinent, the statute to which I have just [fol. 761] referred applies to "whoever corruptly . . . endeavors to influence, intimidate, or impede any witness in any court of the United States . . . or corruptly . . . endeavors to influence, obstruct, or impede the due administration of justice."

I will now charge you as to the meaning of the terms used in the statute.

The term "corruptly" imports three requirements as to knowledge and intent. First, the defendant must know that a proceeding is actually pending in a court of the United States; and, in this connection, I charge you that a Federal Grand Jury proceeding is a proceeding in a court of the United States for these purposes. The government and the defendants in this case have stipulated that a grand jury for the Eastern District of New York, sitting in Brooklyn, New York, was duly impaneled on February 18, 1952 and sat until February 24, 1953.

Secondly, the person must know that the person with whom he is communicating is a witness in the proceeding, or is to be a witness in the proceeding. Of course, a person who is actually under subpoena is a witness, but in addition, potential witnesses fall within the protection of the statute, so that if you find that the defendant Halperin knew or had reasonable grounds to believe that a person whom he approached or caused to be approached, was about to appear as a witness before the grand jury, then this requirement of the statute would be satisfied.

Thirdly, the defendant must deliberately intend by his actions to impede the judicial proceeding.

If a person knowing these facts and with this intention endeavors to influence any witness in any court of the United States to influence, obstruct, or impede the due administration of justice, you have a violation of the statute. Since it is the endeavor which is prohibited by the statute, you need not find that such endeavor met with success. The crime is committed when the endeavor is [fol. 762] made, assuming, of course, that all the other requirements I have defined above are present.

Count Five alleges that a corrupt endeavor was made to influence the witness Morton Marks. Count Six and

Seven charge a corrupt endeavor to influence two witnesses, Louis Berman and Monroe Tobias. You may return a verdict of guilty on Counts Six and Seven if you find a corrupt endeavor to influence both Berman and Tobias, or either of them.

Each of these three counts alleges that the corrupt endeavor consisted in "counseling, requesting, advising, and suggesting" to the witness or witnesses that they give false testimony before the grand jury and that they refuse to answer pertinent questions and refuse to tell the whole truth to the grand jury with respect to the facts and circumstances under which the no-prosecution recommendation had been made in the Pattullo Modes case, in the case of Mr. Marks, and with respect to the same information concerning the Gotham Beef case, in the case of Berman and Tobias.

You have heard testimony that early in 1952, Davis, Hoffman, Halperin and Schopick discussed how they would handle the Brooklyn Grand Jury investigation and how their clients should be advised concerning it. You have heard the testimony of Marks that after he had been subpoenaed to appear before the Brooklyn Grand Jury, Davis said to him: "You cannot talk. You would be crazy to talk." And again: "Morton, are you going to turn me in?"

You will remember that Mrs. Segel testified that while she was under subpoena to appear before the Brooklyn Grand Jury, she had a conversation with Davis in which he told her in substance that the Pattullo Modes people should lie before the Grand Jury. You will also remember that Tobias testified that late in 1951 or early in 1952, he had a conversation with Davis and Halperin, in which Halperin [fol. 763] told him that if everybody was silent, the whole thing would blow over in a short time.

You heard Tobias testify further that sometime in February, 1952, he again saw Davis and Halperin, and that Halperin had said that he had done Berman a good turn and wanted to ask Berman not to hurt him by talking in connection with the tax case.

Tobias testified further that sometime after March, 1952, he had a conversation with Davis and Davis advised him that the Pattullo people had gone into the Grand Jury and

told about the handling of the Pattullo case by Davis and Halperin; that he was afraid that since the Berman case had been handled by the same people at about the same time, that this case was also to be coming up for examination or for action, and please not to talk about the case.

You heard Tobias testify then that a day or two later he had another conversation with Halperin in which Halperin said that the Pattullo people had been before the Grand Jury and had testified with respect to the handling of their tax case, and that he hoped Berman would not do the same thing to him because he had done Berman such a good turn.

Tobias testified that on that occasion, Halperin had said he had been in touch with the Washington associate and that he was going to stand silent, Halperin was going to stand silent, and he hoped that Berman and Tobias would do the same thing.

Tobias said that Halperin had pointed out that whereas the Pattullo people had an open tax year, that wasn't the case as far as Berman was concerned. You will recall that Tobias stated that neither Halperin nor Davis asked him to lie in any regard.

You will recall that Mr. Berman testified that sometime in the latter part of 1951 or early 1952, Mr. Halperin and Mr. Davis came to his office and Mr. Davis told him how he was subpoenaed by the King Committee, and that if any-
[fol. 764] body questioned him on the Gotham Beef case, he should refer them to Davis as his attorney in the matter.

Mr. Berman also testified that sometime in March, 1952, Halperin called to say that he wanted to come to his office to see him; that he, Mr. Tobias and Mr. Halperin went to lunch, and Mr. Halperin said that he expected to be indicted in the matter of the Gotham Beef case and he felt he was going to stand on his constitutional rights and not do any talking, and he wanted Berman to take the same stand, not to talk, and stand on his constitutional rights.

Mr. Halperin, who testified, has denied that he ever met with Hoffman, Schopick or Davis, to discuss how the Brooklyn Grand Jury investigation should be handled and how the clients should be handled. You have heard the testimony of Mr. Halperin that sometime in or about March, 1952, he received a call from Mr. Berman and that

as a result thereof, he went to Mr. Berman's office; that Mr. Berman told him that Davis had spoken to him with respect to having him testify that the sum of $60,000 that he, Berman, had paid to Davis was not paid as a fee; that Berman asked Halperin what he thought he should do; that Halperin advised him to obtain a lawyer and consult with him, and that, as a lawyer, he would advise him to avail himself of his constitutional privilege; that he had not said to Berman that the Statute of Limitations on the tax case had expired, and that they could not be prosecuted even if there was a fraud; that he did not tell Berman that he had done him a good turn and he did not say the least he could do for him was not to talk about it.

You also heard Mr. Halperin testify that he never had a conversation with Mr. Berman in which he told him to lie, nor that the whole thing was a political hullabaloo that would blow over. You have also heard Mr. Halperin deny that on March 10, 1952, or any other day, he asked anyone to see, talk to, or communicate with, Mr. Marks directly or indirectly, so as to influence his testimony or to get him to lie.

[fol. 765] You will recall that Mr. Halperin also denied that on March 15, 1952, he aided and abetted anyone in an attempt to get Mr. Berman to lie, to refuse to answer, or to impede or obstruct justice.

You have also heard Mr. Halperin deny that on March 18, 1952, or on any other day, that he had any similar dealings, directly or indirectly, with Mr. Tobias.

Insofar as the sixth and seventh counts of the indictment are concerned, there was direct testimony by Berman and Tobias that Halperin, knowing that there was a Grand Jury investigation in progress, in which Berman and Tobias might be witnesses, had advised them not to talk. Halperin has directly denied any such conversation. Therefore, you have a direct conflict of testimony. Whom do you believe?

If you can conclude, beyond a reasonable doubt, that Halperin, knowing that a proceeding was pending before the Grand Jury and that the person with whom he was communicating was a potential witness before the Grand Jury, urged him not to tell the truth before the Grand Jury, with a deliberate intent to impede the judicial proceedings, then you may convict the defendant Halperin on those counts.

If, however, you cannot so conclude, or if you conclude that the only advice given by Halperin to these persons was to retain a lawyer, or to invoke their constitutional privilege of refusing to answer questions on the ground that the answers might tend to incriminate them, then you should acquit the defendant Halperin on Counts Six and Seven.

So far as Count Five is concerned, there was no testimony that Halperin talked directly to Morton Marks to advise him not to testify before the Grand Jury. There was the testimony that Halperin met with Davis to discuss the handling of witnesses before the Grand Jury and that, thereafter, Davis talked to Marks and told him not to talk before the Brooklyn Grand Jury.

In this fifth count of the indictment, the defendant Halperin is charged in effect with being an aider and [fol. 766] abettor of the crime therein alleged. Halperin denied that he knew that Davis had spoken to Marks or that he advised or aided Davis in speaking to Marks on this subject.

One who aids, abets, induces or procures the commission of an act is as responsible for that act as if he committed it directly. In order to aid and abet another to commit a crime, it is necessary that the defendant in some way associates himself with the venture; that he participate in it as in something that he wishes to bring about; that he seek by his action to make it succeed. Therefore, if you can conclude, beyond a reasonable doubt, that Davis, knowing that a proceeding was pending before the Brooklyn Grand Jury in which Morton Marks had been or might be subpoenaed, sought to persuade Marks not to testify to the truth, with an intention to impede the judicial proceedings, and if you can conclude that Halperin aided and abetted, within the meaning which I have heretofore given you, such action by Davis, then you may find Halperin guilty on the fifth count of the indictment.

If you cannot conclude, beyond a reasonable doubt, that Davis did, with the knowledge and purposes before mentioned, seek to prevent Morton Marks from telling the truth before the Brooklyn Grand Jury, or that Halperin did not aid and abet Davis in such undertaking, then you should acquit Halperin on the fifth count of the indictment.

On all of the counts of the indictment, therefore, you have issues of fact as to the guilt or innocence of the defendants. You will determine these issues from the testimony of the witnesses and the exhibits which have been received in evidence.

You will determine these issues not from the amount of the testimony, but from the nature, quality and credibility of the testimony. Where there are disputed issues of fact, a great deal depends, of course, upon the credibility of the witnesses and the extent to which the witnesses have been corroborated. The credibility of all the witnesses is for you, and for you alone, to determine.

[fol. 767] You will judge it by applying your ordinary, every day common sense. How did the witness impress you? Was the testimony consistent with any undisputed facts in the case? Was his testimony corroborated?

Another matter which you can take into consideration in judging the credibility of witnesses is whether the witness is interested in the outcome of the case, for when a witness has an interest in a case, the temptation does exist to color his testimony. A defendant, of course, is always interested in the outcome of the case.

Certain witnesses testified that they had been promised consideration or even immunity. You may consider whether this creates an interest in the case on their part such as would tempt them to color their testimony. I am not saying that every witness will testify falsely because he has an interest, but I say you may consider the possibility in determining what weight you will give to the testimony of any witness.

Part of the evidence, but not all of the evidence, has been presented by persons who are named in the indictment as co-conspirators. A co-conspirator would, as a matter of law, be regarded as an accomplice. You must consider the testimony of accomplices or co-conspirators carefully and act upon it with caution. I am not saying that because a person is a co-conspirator or an accomplice, he or she is not to be believed. If this were so, many cases could not be proven. In the Federal Courts, a defendant can be convicted upon the uncorroborated testimony of an accomplice whose testimony satisfies the jury of the defendant's guilt beyond a reasonable doubt.

If you find that any witness has wilfully testified falsely to any material fact or sworn falsely to any material fact, you may reject his entire testimony or, on the other hand, you may accept that which commends itself to your belief and reject that which does not commend itself to your belief. What you accept or reject is up to you. You are the triers of the facts.

[fol. 768] During the cross examination of one of the defendants, the government questioned the defendant as to his previous statements before the Brooklyn Grand Jury in which he refused to answer certain questions on the ground that answers to them might tend to incriminate him. These questions related to matters similar to those to which the defendant testified at this trial when he took the stand. No witness is required to take the stand or required to give testimony that might tend to incriminate him; but when a defendant takes the stand in his own defense at a trial, it is proper to interrogate him as to previous statements which he may have made under oath concerning the same matter, including his assertion of his constitutional privilege to refuse to testify as to those matters before a grand jury. You may use this evidence of a defendant's prior assertions of the Fifth Amendment for the sole purpose of ascertaining the weight you choose to give to his present testimony with respect to the same matters upon which he previously invoked his privilege.

The defendant had the right of asserting the Fifth Amendment when he appeared before the Grand Jury, and I charge you that you are not to draw any inference whatsoever as to the guilt or innocence of the defendant in this case by reason of the fact that he chose to assert his unquestioned right to invoke the Fifth Amendment on that previous occasion. However, it was proper for the Government to question the defendant with respect to his previous invocation of the Fifth Amendment, but you may consider this evidence of his prior assertions of the Fifth Amendment only for the purpose of ascertaining the weight you choose to give to his present testimony with respect to the same matters upon which he previously asserted his constitutional privilege. It is not to be considered in a determination of the guilt or innocence of any co-defendant.

There has been testimony as to the previous good

character of the defendant Scherm. Evidence of good character may in itself create a reasonable doubt. You should [fol. 769] consider such evidence of good character together with all the other facts and all the other evidence in determining the guilt or innocence of the defendant Scherm, but if from all the evidence you are satisfied, beyond a reasonable doubt, that the defendant Scherm is guilty, his prior good reputation will not justify or excuse his offenses.

In the course of this charge, I may have referred to some portion of the evidence, but this should not be taken by you as any indication of my opinion of the comparative importance or weight of that particular evidence. You must determine the case upon your recollection of all of the evidence and not upon what counsel either for the government or for the defendants have said or what I may have said with reference to the evidence. If your recollection of what was said differs from mine or counsel's, follow your own recollection. You alone are the sole judges of the facts. You are not to assume that I have any opinion of the guilt or innocence of the defendants, or any of them, or the truth or falsity of any of the charges.

The fact that the Court has denied motions or granted motions in the course of the trial is not to be taken by you as an indication that the defendants are believed by the Court to be guilty or innocent. These are matters of law with which you, as jurors, have no concern.

The punishment provided for by law for the offenses charged in the indictment is a matter exclusively within the province of the Court. This is not to be considered by the jury in arriving at an impartial verdict as to the guilt or innocence of the accused. Your function is solely to determine from the facts the guilt or innocence of the accused. It is no part of your function to determine what, if any, punishment might be imposed.

If during the course of the trial a question was asked and an objection interposed, and the Court sustained the objection, you are to disregard the question and any alleged facts contained in the question. Similarly, if the Court ruled that an answer be stricken from the record, you are [fol. 770] to disregard both the question and the answer in your deliberations. Statements made by counsel in argu-

ing the admissibility of evidence and colloquies between the Court and counsel with respect to admission or rejection of such evidence are not evidence. Neither are the arguments of counsel either for the government or for the defendants to be considered as evidence. Your verdict will be based upon the evidence that you have heard from the witnesses in the case and on the documentary exhibits which have been admitted in evidence. If by any chance you have heard any discussion of the case or have seen any newspaper article, you should not allow yourself to be influenced in any way by it. You should, in arriving at your verdict, consider only the evidence presented in this Court.

Each count of the indictment must be considered separately, and the guilt or innocence of each defendant referred to in that count must be determined separately. You will, therefore, return a separate verdict with reference to each of the five defendants on the first count of the indictment, a separate verdict with reference to the three defendants named in the second count of the indictment, and a separate verdict with reference to the defendant Halperin on the fifth, sixth, and seventh counts of the indictment.

Insofar as the conspiracy count may involve matters which are much the same as those contained in other counts of the indictment, this mere identity is not a matter for you to consider in determining the guilt or innocence of the defendants, but in the event of conviction, it would be a matter for the Court to consider in fixing punishment.

A copy of the indictment will be sent to the jury room with you. If you should desire any of the exhibits, those will be sent to the jury room upon request. If you want any of the testimony read, that can be done.

This has been a long case and ably tried by counsel for the government and the defendants. It is an important case to the government. It is an equally important case to the defendants. There are twelve men and women on this jury. [fol. 771] Any verdict must be the unanimous verdict of all of them and represent the honest conclusion of each of them. I hope that you will, consistent with your obligations as jurors, and your own individual opinions, endeavor to reach a verdict which will be the verdict of all of you.

I submit the case to you with every confidence that you

will fully measure up to the oath which you took as members of the jury to fairly and impartially, and without fear or favor, decide the issues submitted to you.

Are there any exceptions to the charge?

REQUESTS AND EXCEPTIONS

Mr. Singer: May we be provided, under the rules, with an opportunity to make out exceptions at side bar?

The Court: If there are exceptions to be made?

Mr. Singer: Yes.

The Court (addressing the jury): We will take a recess and hear any exceptions to the charge. We will hear the exceptions to the charge and any further requests to charge that have to be discussed in the robing room.

(The jury left the courtroom.)

(The following took place in the robing room):

Mr. Singer: May I respectfully except to so much of your Honor's charge wherein your Honor told the jury in words or substance that their verdict here would be a clear warning to all that a law may not be violated.

May I further except to so much of your Honor's charge wherein your Honor told the jury that on circumstantial evidence taken alone and taken together, it believed, they could find a defendant guilty. And in this connection I point out that your Honor failed to tell the jury that they must consider the testimony of all the witnesses as well as the defendants, and they cannot be convicted purely on circumstances.

May I respectfully except to so much of your Honor's charge wherein your Honor in discussing the crime of conspiracy and giving the jury your idea of the meaning of the word conspiracy used language which I believe was an unwarranted emphasis on the crime of conspiracy, the lan- [fol. 772] guage that I complain of being in words or substance, "danger to the public," and "formidable attack on the public," or some such language.

May I further respectfully except to so much of your Honor's charge wherein your Honor cited this statement by Justice Holmes of the Supreme Court about conspiracy being partnership in crime, upon the ground that the jury

may not be cited references to opinions of judges, or cases.

I further except to so much of your Honor's charge wherein your Honor compared conspiracy with the law in civil liability cases.

I except to so much of your Honor's charge where, in discussing an overt act your Honor compared an overt act to a man walking across the street.

I except to so much of your Honor's charge wherein your when you were discussing the termination of the conspiracy, the withdrawal, your Honor told the jury in words or substance that there must be an affirmative act of withdrawal, rather than the fact that the jury might find from the evidence that a conspiracy ended, or that a defendant had withdrawn from the conspiracy without an affirmative act, just purely by conduct which would be inconsistent with the theory of conspiracy.

I except to so much of your Honor's charge wherein your Honor told the jury, in substance your Honor told the jury that they were bound to take January 1946 as the beginning of the conspiracy.

I except to so much of your Honor's charge wherein your Honor told the jury that a single conspiracy is alleged.

I except to your Honor's submission to the case to the jury upon the ground that it is a single conspiracy that is alleged. And I respectfully except to your Honor's failure to instruct the jury that they had a right to find more than one conspiracy, as we had outlined to your Honor in our argument, and to the judge before your Honor who handled the motions, that there was more than one conspiracy alleged in this indictment.

[fol. 773] I except to so much of your Honor's charge wherein your Honor told the jury that there was an agreement between Berman and Tobias, or in the Gotham Beef case about escaping prosecution. And I respectfully except to your Honor's failure to instruct the jury that Berman and Tobias never said there was any corrupt agreement. And I respectfully except to your Honor's failure to tell the jury about Berman's and Tobias' version of this agreement.

I respectfully except to your Honor's failure to give to the jury at any time this false affidavit of Smith, and Davis' connection therewith, in this agreement to submit the false affidavit in connection with the voluntary disclosure.

I respectfully except to your Honor's statement to the jury that Berman and the Gotham Beef Company had admitted their guilt to defraud in a tax case.

And I respectfully call your Honor's attention to Berman's testimony that he had never committed any crime, never committed any fraud and that his tax returns were accurate and honest.

I respectfully except to your Honor's statement to the jury, and I think you may have inadvertently erred in your recollection of the testimony, wherein your Honor said that the Pattullo stockholders testified in substance how they brought $100,000 to Davis' office which was given to Halperin.

I respectfully except to so much of your Honor's charge wherein your Honor referred to the testimony with reference to the box and how it was released to Halperin, and in this connection, and I say this very respectfully, but I believe that your Honor said, and I respectfully except to your Honor's charge with relation to the evidence upon the ground that it was just a summation of the Government's claims and testimony without reference to the cross examination of each of those witnesses, and the weakening effect of their admissions on cross examination. [fol. 774] I respectfully except to so much of your Honor's charge which submitted to the jury the issue of conspiracy to conceal facts upon the ground that there is no evidence by the conspirators.

I respectfully except to so much of your Honor's charge which submitted to the jury the question of the statute of limitations.

I repectfully except to your Honor's statement to the jury about the position of the Government with respect to this three-year statute, and I respectfully point out, if that were so, that we were entitled to a statement of the defendants' position with respect to the statute of limitations.

I respectfully except to so much of your Honor's charge in connection with your charge on conspiracy, to the references as to Davis, Marks, Segel, Berman, Tobias' stories or testimony concerning the incidents in March 1952 and February 1952, and in this connection since your Honor attempted to state part of the evidence, I respectfully

except to your Honor's failure to tell the jury that Davis testified that he did not ask Marks to lie, and that he only told Berman and Tobias that he was asking them to rely on the protection of the Fifth Amendment.

I respectfully except to so much of your Honor's charge wherein your Honor submitted as one of the questions whether the conspiracy ended at the time that the no-prosecution claim was made, that your Honor failed to submit to the jury the different times which the defendants requested your Honor to submit to the jury as possible dates when this conspiracy may have ended, including the various incidents which occurred, culminating and ending at least not later than September 1, 1951 at the time of Smith's arrest.

I respectfully except to so much of your Honor's charge when you told the jury in respect to the first count that there were three questions that they had to determine. Then your Honor went on to say if they found in substance that they couldn't answer to all three for all the five defend- [fol. 775] ants, that they all had to be acquitted; but then your Honor said in substance, that if they found no possibility of answering the three questions as to anyone, that they may not find as to all. You failed to point out that if they failed to find one of those questions in the affirmative as to an individual defendant, then he is entitled to be acquitted. You failed to distinguish from the group or more than two.

I respectfully except to so much of your Honor's charge which stated to the jury that it was not necessary for the Government to prove that the judgments or actions of any Government employee, the decisions of any Government employee were wrong. And I point out to your Honor that this overlooks the natural, normal effect of the testimony, that if an action is right and proper it is the strongest means of disproving a charge of wrongdoing.

I respectfully except to so much of your Honor's charge wherein, in referring to the seventh overt act you referred to the testimony of Schopick and Smith, and your Honor's failure to tell the jury at any point that Schopick was not a witness and that there would have to be some thing that the jury had to consider in connection with the failure of the Government to call Schopick as a witness.

I respectfully except to your Honor's failure to tell the jury when you were discussing effect of the overt acts in connection with the alleged testimony of secrecy or attempt to impede justice, in connection with Berman, Tobias, et cetera, you failed to tell the jury at that time that what Halperin's testimony was on that subject, or the Berman and Tobias testimony on cross examination.

I respectfully except to so much of your Honor's charge which said that the law under which you referred to Counts 5, 6 and 7 referred to potential witnesses. I respectfully state in that connection that the law applies only to a person who is a witness.

Now I respectfully except to your Honor's reference to the testimony of Mrs. Segel in connection with Counts [fol. 776] 5, 6 and 7, and I point out that Mrs. Segel's testimony in no way supported the testimony of the other witnesses on 5, 6 and 7, and she is not one of the persons named in Counts 5, 6 and 7 as a person against whom or concerning whom the alleged crime was said to have been committed.

I respectfully except to your Honor's failure in discussing Counts 5, 6 and 7 to tell the jury that Davis had testified that at a certain period of time, and more particularly, the time Davis claims he had talked to Tobias and Hoffman in March 1952, with Tobias and Berman, that Davis was not on speaking terms with the defendant Halperin, and that he testified, Davis did, that he had not told Halperin before he went and he didn't tell it to him until seven months later.

And I respectfully except to your Honor's use of the words "potential witnesses."

Now I respectfully except to your Honor's statement to the jury concerning accomplice witnesses, and I particularly except to this language of your Honor's charge, "if this were so, many cases couldn't be proven," and I respectfully state that that is an unfair comment to a jury, to be called upon to determine a case under circumstances so involved. Your Honor by that statement is telling the jury that if they didn't believe the testimony of accomplices, even though it were uncorroborated, and even though the accomplices, as they were in this case, were the persons who had admitted lies, that the jury must believe them, or

many cases would not be proven. And I think that puts a defendant in this case in an improper position before the jury. I respectfully except, therefore, to your Honor's statement with respect to that.

I respectfully except to your Honor's reference to the testimony of Halperin and the cross examination of Halperin in connection with his grand jury testimony, and I respectfully except particularly to your Honor's language where your Honor said it was proper for the Government to interrogate Halperin in connection with his claim of [fol. 777] constitutional privilege. And I respectfully except to your Honor's failure to tell the jury that innocent men have a right to use and claim the privilege. And I respectfully except to your Honor's statement to the jury that they may use the evidence of Halperin's claim of constitutional privilege as a basis by which they could judge the weight of his testimony at this trial.

And in this connection I respectfully except to your Honor's refusal to charge in the language of Mr. Corbin's request, more specifically, your Honor's refusal to charge the specific language my requests as to 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17, and Mr. Corbin's requests 53, 54, 55 and 56.

I also desire, so that I need not repeat it, to specifically take advantage—and I ask that it be considered as one of my exceptions—of any other exceptions taken by any counsel who addresses your Honor subsequently.

Mr. Bennett: I join in Mr. Singer's exceptions. They are largely applicable because of the possible effect of the fifth, sixth and seventh counts with respect to the determination of the jury under Count 1.

I would like to call your Honor's attention to another misstatement which was undoubtedly inadvertent. You mentioned that on two occasions Hoffman testified that the money was delivered to Grunewald in Washington. I believe you will find there is no such testimony, and we except to your Honor's statement to the jury in that regard.

The Court: Let me ask you this. What is your basis for saying that is a misstatement?

Mr. Bennett: Hoffman stated he accompanied Halperin to Washington, and that they met Halperin and Grune-

wald, and Halperin subsequently left. There was no testimony that he then delivered the money to Grunewald, he saw the money delivered to Grunewald, or anything of that kind.

The Court: It is my recollection of the testimony, and if I am wrong, I think it should now be corrected, that [fol. 778] Hoffman said that the money was in two brief cases or bags, that they took them to Washington and that the two bags were given——

Mr. MacMahon: Your Honor, Mr. Bennett is correct on that version of it, but he overlooks the later testimony that Mr. Davis testified that Halperin subsequently told him he had delivered the money to Grunewald.

The Court: I will correct the jury on that.

Mr. Bennett: I also except to your Honor's submission to the jury of the Nancy Hain testimony as assuming a possible basis for an inference that Grunewald was a party to any continuing conspiracy to conceal. Our contention is that her testimony affords no basis for such an inference, that she had no knowledge whatsoever of the Gotham Beef or Pattullo cases, wasn't around in those years, and couldn't have had any testimony to give in respect to those cases or in respect of any continuing conspiracy to conceal what was done with respect to those cases.

I also except to your Honor's failure to define specifically the word "corruptly" in connection with the alleged conspiracy to corruptly influence witnesses. Our feeling is that the jury should be told in that regard that "corruptly" means to intimidate, to bribe, to threaten and do things of that kind.

We except to the word "impede" which your Honor used generally in that connection as not a full and accurate definition.

I think Mr. Singer already mentioned the fact that your Honor stated that there had been an admitted tax fraud in connection with the Gotham Beef case, and we except to that statement on the ground that there was no admission of a tax fraud at any time by the Gotham Beef people.

We also except to your Honor's failure to advise the jury specifically that every essential part of a charge must be established beyond a reasonable doubt with respect to each defendant.

I think that about covers us.

[fol. 779] The Court: Mr. Aranow?

Mr. Aranow: I join with Mr. Singer and Mr. Bennett in their exceptions, and I would add one more with reference to circumstantial evidence. I except to your Honor's statement that, "If you find that all the circumstantial evidence is inconsistent with the theory of innocence, then you may find guilt."

The Court: I don't believe I said that.

Mr. Aranow: I think you said that every piece of evidence, if it is inconsistent with innocence, may be resolved in favor of guilt.

I know you used the words "all the circumstantial evidence."

The Court: What I said was: If all the circumstances taken together are consistent with any reasonable hypothesis which includes the innocence of a defendant, then the prosecution has not proved his guilt beyond a reasonable doubt, and you must acquit him. On the other hand, if you find that all the circumstances established by the evidence in this case, taken together, satisfy you beyond a reasonable doubt of the guilt of a defendant, in accordance with these instructions, it is your duty to find such defendant guilty.

Mr. Aranow: Well, I find fault with that. My exception is to the use of the words, "all the circumstances taken together."

The Court: It is "all the circumstances established by the evidence . . ."

Mr. Aranow: I believe that that was not clear, and that each and every piece of circumstantial evidence is entitled to the same test and not all the circumstances, or all the evidence.

The Court: Any further exceptions?

Mr. Gottesman: Yes. With respect to the defendant Scherm, I of course adopt all the exceptions put upon the record by Mr. Singer and Mr. Aranow and Mr. Bennett, as well as those that may be put on the record after me by Mr. Rosenblum and Mr. Perry.

[fol. 780] I specifically want to direct your Honor's attention to the fact that there was no charge with respect to the question of withdrawal from a conspiracy with refer-

ence to Scherm, namely, the fact that he was putting the lie to Smith on a voluntary disclosure, which might be considered by the jury.

Further, we respectfully except with reference to the statute of limitations on Count 2 as five years. We, of course, claim it is three years.

The fact that no wrong decision was made by an agent is, we believe, evidence which the jury may consider as to whether or not a bribe was actually passed.

The Court: I certainly think it is. I don't think I intended to indicate to the contrary.

Mr. Rosenblum: We respectfully except to the Court's statement that the guilt of the defendants Hoffman, Davis and Schopick in this indictment will be determined in another trial.

In that regard, I call your attention to the fact that there was a prior indictment and that there is evidence in the record to the effect that they pleaded guilty to the counts of the indictment similar to the ones in which they are charged in this indictment.

The Court: As I understand it, the trial against these defendants under the present indictment has been severed.

Is that correct, Mr. MacMahon?

Mr. MacMahon: Yes, your Honor.

Mr. Rosenblum: I point out that there is a prior indictment in which there is exactly the same charge leveled against them, and as to that they have pleaded guilty. I merely direct your Honor's attention to your affirmative statement to the jury that they will be tried at a future time.

We also respectfully except to the charge made by the Court upon the following grounds:

First, that the Court has failed to give the instructions requested by the defendant Steinberg.

[fol. 781] Second, as to the charge as given by the Court as requested by the Government.

Third, upon the instructions as given by the Court to the jury.

Fourth, upon the instructions requested by the defendant Steinberg or some one or more of them and modified by

the Court: You said that you would not accept some of our instructions in the form in which they were requested.

We also except on behalf of the defendant Steinberg to the Court's definition of reasonable doubt in the form given because the Court failed to instruct the jury that reasonable doubt could arise not only from the evidence presented, but also from a lack of the evidence presented.

We also take exception to the Court's instruction to the jury that it had the right to take the indictment to the jury room, to read it and to consider it in connection with their deliberations in this case.

We take the position that the indictment is not in evidence, and that the jury has no right to the indictment in any case, and in particular in this case, where so many things are charged in the indictment, since it is the rambling type of indictment and contains many things that the Government has not even attempted to prove.

We further respectfully except to the Court's instructions to the jury as to circumstantial evidence in which it charged the jury that it could draw inferences from certain facts, but at the same time failed to charge the jury that it could not draw an inference upon an inference; and we except to the Court's failure to charge the jury and explain to them what is meant, as a matter of law, by drawing an inference upon an inference.

We further except to your Honor's charge and to that portion of the charge by which the jury was informed that an implied understanding was sufficient.

We also except to that portion of the Court's charge by which the Court in effect stated that, as a matter of law, conspiracies usually are entered into secretly, there [fol. 782] being no basis in fact in the record that would support such a statement, and that the matter is not of such common knowledge that the court can charge it as a matter of law.

We also except to that portion of the Court's charge which referred to the withdrawal of a co-conspirator from a conspiracy because of the Court's failure to advise the jury that there is no burden resting on the defendants, or on the defendant Steinberg in particular, to show that he had withdrawn from the conspiracy; but that the burden,

on the contrary, rests upon the Government to show, beyond a reasonable doubt, that the defendant was in fact a guilty participant in the alleged conspiracy during the life of the conspiracy as attributed to it by the Court.

We also further respectfully except to the Court's charge where, during the recital of the so-called facts, the Court failed to recite the testimony of the Government witnesses where there was a conflict in the evidence by such witnesses as to the same fact or evidence with reference to such alleged fact.

Specifically, we also, in behalf of the defendant Steinberg, adopt the exceptions which have been advanced by each and every one of the attorneys for the defendants, and note all the exceptions which were previously stated upon the record by me and by Mr. Perry in behalf of the defendant Steinberg.

We respectfully except to your Honor's refusal to charge that mere association may lead to suspicion but not a basis sufficient to lead to a finding of fact of guilt, where it is merely because of the association between various individuals.

We also respectfully except to your Honor's charge with reference to the charge of conspiracy in that although you charged it may be a continuing conspiracy, it is not the same as a continuing conspiracy.

Mr. Gottesman: Of course, I take exception to your Honor's failure to charge those charges which I have presented, but more specifically I except to your resume of the [fol. 783] facts with respect to the $40,000 and to your resume of all the facts in the case. You misstated them, if your Honor pleases.

Mr. Rosenblum: I specifically join in that exception.

Mr. Singer: I have made all my exceptions without waiver of the specific exceptions I took to the Court's refusal to charge the requests to charge that I submitted personally or any other counsel submitted, to which exceptions had previously been taken.

Mr. Gottesman: I join in that, your Honor, and take the same exceptions.

The Court: I have had all exceptions.

Does the Government have any exception?

Mr. MacMahon: The Government has two or three here, your Honor.

With respect to Count 1, your Honor charged that the effective date of the statute of limitations was October 25, 1951. The Government's position with respect to the date is September 1, 1951. In other words, a date three years preceding the enactment of the statute of limitations rather than three years preceding the date of the indictment.

The Court: Is that on the first count?

Mr. MacMahon: On the first count, yes.

(Discussion off the record.)

The Court: Next exception?

Mr. MacMahon: Your Honor, the other one is on Count 2. We except to your Honor's charge of the five-year statute as being the Government's contention. The six-year statute applies.

With reference to your Honor's charge on Count 1 dealing with overt acts, I believe your Honor charged that the jury could only consider those overt acts charged in the indictment in determining whether there was an overt act within the statutory period. We think the law is clear that they can consider any overt acts committed within the statutory period, whether or not it is an overt act charged in the indictment.

[fol. 784] The Court: All right. All exceptions are duly noted and overruled.

Mr. Singer: Exception.

Mr. Rosenblum: I have one exception I wish to make, your Honor.

The Court: State it.

Mr. Rosenblum: We respectfully further except to that portion of your Honor's charge wherein you stated these defendants or some one or more of them could be found guilty in the event the jury found from the evidence that we had actual knowledge or in effect I believe the Court said what might amount to constructive knowledge. We urge that this was error because constructive knowledge of an unalleged conspiracy is not sufficient to charge Steinberg with criminal responsibility therefor.

We urge that the knowledge that is essential as a matter

of law to charge Steinberg with knowledge of the alleged conspiracy must be first not only the actual existence of such a conspiracy, but second, the fact that the defendant Steinberg had actual knowledge, not constructive knowledge, or any knowledge of certain facts from which he should have known that there was a conspiracy.

In that regard we also urge that there must be actually brought home to Steinberg the existence of a conspiracy and that Steinberg knowing of the conspiracy willingly agreed to become a participant in such conspiracy and actually did become a member of the conspiracy.

(The following took place in the courtroom in the presence of the jury):

The Court: In the course of my charge I stated that Mr. Hoffman accompanied Mr. Halperin to Washington and that they handed over these bags or briefcases to Mr. Grunewald at the railroad station in Washington. I think the testimony of Mr. Hoffman was that he accompanied Mr. Halperin to Washington and they had these two bags or briefcases, with the $100,000 in them and [fol. 785] they met Mr. Grunewald at the railroad station in Washington, and that Mr. Halperin left with Mr. Grunewald. I don't believe there is any testimony that actually these two bags or briefcases were handed to Grunewald, but rather that Grunewald and Mr. Halperin left together. And there was testimony of Mr. Davis that Mr. Halperin had later said that he had given the bags or money to Mr. Grunewald. I want to make that clear so there will be no misunderstanding as to what the testimony was.

I am now submitting the case to the jury and I again want to thank you for your very careful consideration. When you leave to retire you can if you wish have your lunch first, and the Marshal will see that you have lunch.

I will be in the Courthouse until you reach a verdict, and any time you wish any further information I will be available. Let the Marshal know and I will be available.

I will now excuse Mrs. McKnight and Mr. Flynn, the two alternates, and I also thank them. I think it was the poet Milton who said, "They also serve who only stand and wait."

Your service in standing and waiting is equally as real as though you were now about to deliberate with the jury. After the jury has retired, if Mrs. McKnight and Mr. Flynn would like, I would be glad to meet them in the robing room and shake their hands and extend personally my thanks to them for their attention in this case.

(At this point the Deputy Marshals were sworn.)

(The jury retired to go to lunch at 1.00 p. m. and returned to commence deliberations at 2.15 p. m.)

Mr. Singer: I respectfully except to your Honor's last charge to the jury, and I point out that your Honor in this connection has failed to inform the jury that Mr. Halperin denied that there was any money in those suitcases or brief cases.

The Court: I point out that I previously so stated.

(Recess to 2.15 p. m.)

[fol. 786] VERDICT

(At 9.20 p.m. the jury returned to the courtroom and the following occurred.)

(Roll call of the jury.)

The Clerk: Mr. Foreman, have the jury reached a verdict?

The Foreman: Yes, we have.

The Clerk: How say you?

The Foreman: On the first count we find Henry Grunewald, Daniel Bolich and Max Halperin guilty; Max Steinberg, Harry Scherm, not guilty.

On the second count we find Daniel Bolich guilty; Max Steinberg, Harry Scherm, not guilty.

On Counts 5, 6 and 7 we find Max Halperin guilty on each count.

The Clerk: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded.

You say on Count 1 you find the defendants Grunewald, Bolich and Halperin guilty, and the defendants Steinberg and Scherm not guilty.

On Count 2 you find the defendant Bolich guilty and the defendants Steinberg and Scherm not guilty.

On Counts 5, 6 and 7 you say you find the defendant Halperin guilty.

The Foreman: On each count.

The Clerk: On each count.

The Foreman: Correct.

The Clerk: 5, and 6 and 7 and so say you all?

The Foreman: Yes.

The Court: Do you wish the jury polled?

Mr. Corbin: No.

The Court: Ladies and gentlemen, I thank you for your very careful attention to this case and the problems you have had before you. I think you are deserving of the thanks of the Court and of your country for your very loyal service on this jury, and you may go forth with a feeling that you have faithfully performed your duty as citizens of this country, and your part in the administration of justice.

[fol. 787] Ladies and gentlemen of the jury, you are discharged with the thanks of the Court.

(The jury retired from the courtroom.)

New York, April 1, 1955;

10.30 o'clock a.m.

MOTIONS ON BEHALF OF DEFENDANTS AND RULINGS THEREON

The Court: Are there any motions to be made?

Mr. Rosenblum: I received some word at the office that I failed to move to discharge the bail for Mr. Steinberg, and I do so now.

The Court: Is it necessary?

Mr. MacMahon: The Government consents to it, your Honor.

The Court: I think all you had to do was submit an order to me.

Mr. Rosenblum: And may I make the same motion for Mr. Scherm?

Mr. MacMahon: Yes.

The Court: It will be discharged. All you have to do is submit an order in those cases.

Mr. Singer: If your Honor please, on behalf of the defendant Halperin, I would like to file this motion to set aside the verdict and for a new trial (handing to the Court).

The Court: Just let me read it.

Mr. Singer: I have served a copy on United States Attorney.

The Court: I take it, Mr. Singer, then, this document constitutes your motion.

Mr. Singer: My motion for a new trial, rather than have it read into the record.

The Court: All right.

Mr. Singer: And I also move in arrest of judgment on the first count, and I will just state the grounds of it. [fol. 788] First, the indictment does not state facts sufficient to constitute an offense against the United States, and, second, that the Court is without jurisdiction of the offense on the ground that it was not committed in this district, and with respect to the fifth, sixth and seventh counts, I move to arrest judgment upon the ground that each of those counts does not state facts sufficient to constitute an offense against the United States.

The Court: Mr. Bennett.

Mr. Bennett: Your Honor, I haven't prepared a written motion, but I have seen Mr. Singer's motion, and I think all of those points which he mentions are applicable to the defendant Grunewald, and to save time I join in the motions for a new trial, to set aside the verdict and grant a new trial, and a motion in arrest of judgment, with respect to Count 1 particularly on behalf of the defendant Grunewald. I join in those motions.

The Court: Mr. Aranow.

Mr. Aranow: On behalf of the defendant Bolich, I also join with Mr. Singer in his motions, and I submit, if your Honor pleases, a separate motion made on behalf of the defendant Bolich in addition (handing to the Court).

The Court: Let me just read it, Mr. Aranow.

Mr. Aranow: Yes, sir.

Mr. Aranow: I also would like to file with your Honor a certificate of Dr. Fearon.

Since Friday of last week Mr. Bolich has had another heart attack, and as the doctor says, there has been evidence of recent myocardial infarction evidenced by elevation of temperature, elevation of sedimentation rate and drop in blood pressure and characteristic electrocardiographic abnormalities. The doctor in his opinion says at this time for Mr. Bolich to leave the hospital would be a serious danger to his life; and I would like to file that certificate with you. I showed it to the district attorney.

I would therefore ask that your Honor put the date of sentence down for either the 14th or 15th of April. I hope by that time I will be able to have him here for sentence. [fol. 789] The Court: Any further motions?

(No response.)

The Court: I will direct that Mr. Singer's motion on behalf of Max Halperin be filed as part of the record in the case. I will direct that the motion made by Mr. Aranow, Mr. Callahan, on behalf of the defendant Bolich be made part of the record in the case. I will direct that the doctor's certificate, from Dr. Fearon, be made part of the record in the case, and they will be properly marked as such.

The motions made by Mr. Singer, Mr. Bennett, and Mr. Aranow are denied and you may have exceptions.

We will now proceed with sentence, and the first question I take it is the condition of Mr. Bolich. I take it that is the first problem we have.

Mr. MacMahon, have you had any opportunity to consider the effect of this letter?

Mr. MacMahon: Yes, your Honor, I have, and because of it I suggest that we adjourn the sentence of Mr. Bolich for a period of two weeks, about April 13th or 14th.

* * * * * * *

The Court: Does Mr. Grunewald wish to make any statement before I impose sentence?

Do you wish to say anything to the Court before I impose sentence, Mr. Grunewald?

Defendant Grunewald: Your Honor, the only thing I can say is that I feel that the accusation directed to me is far from foundation, regardless of the jury, and I will go

along with the American jury all the time, and that is all I can say. I leave myself at your mercy, and I would like to get out on bail, and that is all.

The Court: Does Mr. Halperin wish to make any statement?

Mr. Halperin: There is nothing I can add to what Mr. Singer has said. I received an eminently fair trial before your Honor. I was ably represented, and your Honor of course knows that I am walking the last mile in the shadow [fol. 790] of death; and considering that I am to be deprived of the right to practice law and making a livelihood, no matter how meager it was, and after practicing 45 years, I would think that is a very severe punishment in itself, being disbarred automatically.

I don't know what the Government could gain by my imprisonment or incarceration.

I ask your Honor under the circumstances to temper justice with mercy.

The Court: Mr. MacMahon, do you wish to add anything?

Mr. MacMahon: No, your Honor.

JUDGMENT

The Court: It is always a serious and solemn problem for a judge to impose sentence. Sometimes sentence is imposed with the hope of reformation. Other times, sentence has to be imposed as a warning to others, who might be led into temptation, that they will not succumb to that temptation.

I think that is what the Court has to consider in this case.

Those of us who have lived in warm climates have seen how frequently old and noble structures that have stood for generations can be undermined when termites get in and silently and unknown to the occupant, gnaw away at the foundations until the whole structure collapses.

The structure of our great republic could be undermined in the same way if we allow termites, such as these defendants, to gnaw away at the honesty and integrity of sworn governmental officials, and there must be a warning that that will involve punishment, so that those who may be

tempted to do it in the future will know what they will suffer.

It is the sentence of this Court that the defendant Grunewald, on the first count of the indictment, be sentenced to five years in jail and a fine of $10,000.

It is the sentence of the Court that the defendant Halperin, on the first count of the indictment, be sentenced to five years in jail and a $5,000 fine.

[fol. 791] It is the sentence of the Court that on each of the fifth, sixth and seventh counts of the indictment, the defendant Halperin be sentenced to two years in jail on each count to run concurrently with the sentence imposed on the first count, and that on each of the fifth, sixth and seventh counts, the defendant Halperin be fined $1,000.

REQUESTS TO CHARGE OF DEFENDANT GRUNEWALD

1. It is the duty of the Court to explain the law in the case and of the attorneys to present the evidence and arguments.

2. No statements or arguments of attorneys constitutes proof; proof is the testimony of witnesses and the exhibits which have been admitted to the case.

3. It is the function of the jury, and of the jury alone, to decide the facts of the case. The jury is the sole judge of the facts.

4. It is the jury's duty to decide the facts without prejudice or favor to one side or the other.

5. It is further the duty of each individual juror to decide the facts according to his own conscience. While he should discuss the evidence with fellow jurors and consider the same with them, each juror must finally vote only in accordance with his own honest conclusion, whether that conclusion accords with the conclusions of his fellow jurors or not.

6. The defendant in a criminal case is presumed to be innocent and such presumption remains with him and in [fol. 792] his favor throughout the case until the jury

reaches a conclusion of guilt beyond a reasonable doubt.

7. No defendant can be convicted upon any count of the indictment unless, upon such count, the jury is satisfied of his guilt beyond all reasonable doubt.

8. The burden is upon the Government to prove guilt beyond such reasonable doubt.

9. There is no burden on the defendant to prove anything.

10. The defendant is entitled to stand silent and the fact that he does so cannot and must not be, in any way, used against him, directly or indirectly.

11. No defendant can be convicted of anything upon guesswork or assumption; a verdict must rest upon facts established in the proof.

12. Every material part of a charge must be proven by the Government beyond reasonable doubt.

13. Where evidence is circumstantial, the circumstances must be such as to exclude every reasonable hypothesis of innocence before an inference of guilt may be drawn.

14. An inference of guilt cannot be based upon circumstantial evidence unless such evidence is consistent only with guilt.

15. An indictment is not proof of anything. It is merely a statement, in legal form, of the charge and no inference may be drawn against any defendant on any matter merely because he is indicted.

[fol. 793] 16. The Government evidence consists almost wholly of testimony of persons alleged by the Government to be co-conspirators.

17. A co-conspirator would, as a matter of law, be regarded as an accomplice.

18. While the testimony of alleged accomplices is admissible, such testimony should be scrutinized by the jury with the greatest of care.

19. The testimony of alleged accomplices should ordinarily not be accepted unless corroborated by independent proof.

20. With respect to Count One of the indictment, if the jury should find that any material part of said count has not been proven by the Government beyond a reasonable doubt, the defendants should be acquitted on said count.

21. The Government has failed to prove the conspiracy alleged in Count One of the indictment.

22. If the jury should find that there was no one single conspiracy of all the persons alleged in Count One to be co-conspirators, but several different conspiracies with different ends in view, then the jury must acquit the defendants on Count One.

23. Even if the jurors should find that there was a conspiracy to fix the Pattullo case and the Gotham Beef case, if they should also find that the object of such conspiracy was accomplished by 1949, they must acquit the defendant Grunewald on Count One.

24. The conspiracy charges referred to in Count One are subject to a three year statute of limitations, which [fol. 794] means that, if the conspiracy's object was accomplished and the matter ended either in 1948 or 1949, the defendant Grunewald must be acquitted thereon.

25. Even if the jury should find that there was a conspiracy to which the defendant Grunewald was a party, if his connection with it ended in 1949, he must be acquitted on Count One.

26. If the jury should find that defendant Grunewald conspired with respect to disposing of tax cases in 1948 and 1949, but did not conspire as to the other matters referred to in Count One, he must be acquitted on Count One.

27. Ordinarily, no defendant is bound by or may be affected by anything except his own acts and statements.

28. Where a defendant is in a conspiracy, acts and statements of co-conspirators done to effect the objects of the conspiracy may be considered against him. However, it must first be established beyond a reasonable doubt that there was a conspiracy and that the particular defendant was a party thereto and then it must be likewise established that the particular conduct was in furtherance of the conspiracy.

29. The defendant Grunewald cannot be convicted on Count One except by proof of his own acts and statements establishing beyond a reasonable doubt that he was a co-conspirator.

30. A defendant cannot be found to be a member of a

conspiracy except to the extent that he has become aware of and assented to its purposes and objects.

31. Where several conspiracies exist, participation in all cannot be inferred from participation in one.

[fol. 795] 32. In weighing Davis' testimony, his motives and incentives should be considered and his testimony should not be accepted unless corroborated.

33. Once the object of a conspiracy has been accomplished, one alleged conspirator may not speak or act for any other alleged conspirator and the acts and statements of any one are no longer to be used against the other.

34. Most of the evidence in this case relates to matters said or done by one alleged conspirator where one or more or sometimes all of the defendants were not present. Such testimony is not to be considered against any defendant not so present unless the jury first finds that such defendant was a party to the alleged conspiracy and that the particular testimony urged against him concerns something said or done in furtherance of the conspiracy.

35. Testimony of the witnesses such as Hoffman, Marks, Davis, Smith, Tobias and Berman may not be considered as against the defendant Grunewald unless it first be found that Grunewald was conspiring with them and that acts or statements referred to were in furtherance of such conspiracy.

36. Testimony with respect to anything said or done by Hoffman, Davis, Halperin, Steinberg, Scherm or Bolich may not be considered against the defendant Grunewald unless it be found that, at the time of such act or statement, said defendant was a conspirator with the particular person speaking or acting.

37. There is no evidence that the defendant Halperin was authorized at any time to speak for the defendant Grunewald.

[fol. 796] 38. No inference that Halperin was authorized to speak for Grunewald can be drawn from statements of Halperin alone.

39. Testimony as to what Halperin may have said at any time is not in itself evidence against Grunewald and no finding that a conspiracy existed can be based upon such evidence.

40. No man can make himself an agent or representative of another merely by saying so.

41. Agency or conspiracy cannot be proved by quoting statements of the alleged agent or co-conspirator.

42. Any act of Davis in respect of asking a witness not to testify against him is not chargeable to the defendant Grunewald unless the proof establishes beyond a reasonable doubt that Grunewald knew of such proposal and conspired to have the act done.

43. The same applies with respect to any statement of Halperin.

44. There is nothing illegal in any suggestion that a witness may or should rely upon his constitutional privilege to remain silent.

45. Any lawyer or layman is entitled to state with impunity his view that it would be wise or smart to rely upon his constitutional privilege to prevent self-incrimination and no defendant may be convicted by reason of any such statement.

46. A mere expression of hope that a prospective witness would not testify is not a crime and no defendant may be convicted under any count because of an expression of such hope by any person.

[fol. 797] 47. In determining the credibility of witnesses, the jury should take into account all matters of self interest which might provide a motive for the witness to testify falsely.

48. In determining the credibility of witnesses, the jury should also consider the manner of their testifying, whether they were frank and open, whether they were evasive and should take into consideration the witness' character and any admitted sets of wrongdoing.

49. In determining the credibility of witnesses, the jury should consider whether they would in their own affairs be willing to act with reasonable certainty on the words of such witnesses and should not accept testimony unless they would be willing so to act.

50. The jury may reject in whole or in part the testimony of any witness and may specifically disregard the entire testimony of any witnesses whom the jury finds to have willfully testified falsely.

51. In connection with the government's claim that there was a conspiracy to fix tax cases in 1948 and that it was a part of the same conspiracy to keep the facts from investigating committees and grand juries in 1951 and 1952 and thereafter, the jury is instructed that no finding that there was one such continuing conspiracy can rest merely upon general instructions or statements back in 1948 to one party or another to keep his mouth shut or not to tell anybody.

52. Nor can any such continuance of conspiracies be based upon any assumption that conspirators always impliedly agree to continue to keep their conduct secret forever.

[fol. 798] ADDITIONAL REQUESTS TO CHARGE

53. The assertion of the constitutional privilege against self incrimination is not an admission of guilt.

54. The refusals of the defendant Halperin to answer certain questions when called as a witness before the Brooklyn Grand Jury may not be considered by the jury on this trial as any admission on his part of guilt of any of the charges in this indictment.

55. Nor may such refusals in themselves be regarded by this jury as an admission by Halperin of the truth of any charges implied in the questions which he thus refused to answer before the Brooklyn Grand Jury.

56. An innocent man may honestly claim that his answers may tend to incriminate him.

DEFENDANT, MAX HALPERIN'S REQUEST TO CHARGE
Re: FIRST COUNT

Halperin requests the Court to Charge:

1. There is no evidence that an agreement to influence witnesses, as charged in Counts Five, Six and Seven of the indictment, was part of the conspiracy charged in Count One.

2. In view of the express testimony regarding the conspiratorial agreement in the Government's proof by the

parties to the alleged agreement, the jury may not draw [fol. 799] any inference that the acts alleged in Counts Five, Six and Seven of the indictment were part of the agreement charged in Count One.

3. That the acts charged under Counts Five, Six and Seven of the indictment may not be considered by the jury to be overt acts under Count One.

4. That if the jury finds that no overt acts relating to tax fixing—as distinguished from alleged corrupt influencing of Grand Jury witnesses—occurred within the period of three years prior to October 25, 1954, the date of the filing of the indictment herein, they must find defendant, Halperin, not guilty of Count One.

5. That defendant, Halperin, may not be found guilty by virtue of any finding the jury might make regarding the Scherm transaction.

6. That the jury is entitled to find that the Pattullo Modes criminal case, the Gotham Beef criminal case, other cases referred to in the Government's proof, and the civil penalty transaction involving defendant, Scherm, each constituted separate conspiracies, and that the acts charged in Counts Five, Six and Seven were likewise separate matters, and that the omnibus conspiracy charged in Count One did not exist, and if the jury should find that the proof shows the existence of more than one conspiracy, instead of the single conspiracy charged in Count One, they must acquit defendant, Halperin, under Count One.

Re: Fifth, Sixth and Seventh Counts

7. There is no direct evidence that Halperin ever made any statement to Marks or Mrs. Segal concerning the allegations of Count Five.

[fol. 800] 8. There is no testimony that Halperin ever saw or spoke to Marks or Mrs. Segal during 1952 or on or about March 10, 1952.

9. If there is any conflict between the testimony of Davis and the testimony of Marks or Mrs. Segal, the conflict must be resolved in favor of Halperin and the Government must be bound, therefore, by the testimony of the witness Marks or Mrs. Segal on the Fifth Count.

10. The jury must take into consideration the testimony

of Halperin wherein he denied that he ever knew that Davis had spoken to Marks or Mrs. Segal on the subject referred to in the Fifth Count or that he ever advised, counseled, aided or abetted Davis in speaking to Marks or Mrs. Segal on this subject.

11. There is no proof that Halperin aided, abetted, advised, counseled or procured Davis to speak to Marks or Mrs. Segal on the subjects set forth in the Fifth Count of the indictment.

12. With reference to Counts Five, Six and Seven, it is not a crime or a violation of law to advise any person called as a witness to rely upon or exercise any right or privilege granted by the Constitution of the United States.

13. If the jury finds from the evidence, that Marks, Tobias and Berman were advised by Halperin, or by anyone else, in effect solely to rely upon the rights and privileges guaranteed by the Fifth Amendment to the Constitution of the United States, then the defendant, Halperin, must be acquitted as to Counts Five, Six and Seven.

14. That from the proof in the case, the jury must hold and find that the testimony of these three witnesses, Marks, Tobias and Berman, were controlled by attorneys other [fol. 801] than Halperin, whom each of these three witnesses separately retained to represent them at such committee hearings and the actions of these witnesses before said Congressional Committee investigations was upon the advice of these lawyers and that the actions of these witnesses before said Committees, acting under the advice of their own attorneys, cannot be considered against Halperin in any connection by the jury in their discussion or consideration of the evidence under Counts Five, Six and Seven.

15. That the jury must consider the testimony of the witnesses, Tobias and Berman, that neither Davis nor Halperin told them to tell a lie or asked them to lie in any regard.

16. The jury is entitled to draw the inference with respect to Counts Six and Seven, that the defendant, Halperin, was in effect simply advising Berman and Tobias to invoke their Constitutional rights not to testify, and that if the jury does draw such inference, they must find defend-

ant, Halperin, not guilty under the Sixth and Seventh Counts.

17. The Government is bound by the testimony of Davis, that his talks with Berman and Tobias on or about the time set forth in the Sixth and Seventh Counts of the indictment, were when he was not on speaking terms with Halperin and that Halperin had not advised, counseled, aided, abetted or procured him to talk to Berman and Tobias and that under these circumstances, it is only the talks between Halperin, Tobias and Berman that may be considered against the defendant, Halperin, in the consideration of the Sixth and Seventh Counts.

[fol. 803] ADDITIONAL REQUESTS TO CHARGE OF DEFENDANT, MAX HALPERIN

18. The failure of the Government to call as witnesses Mr. Zipser, Mr. Cohen and Mr. Schopick, all of whom are under the control of the Government, permits the jury to draw an inference that the testimony of these witnesses would not support the position of the other Government witnesses concerning incidents and conversations at which Zipser, Cohen and Schopick are alleged by these Government witnesses to have been present.

19. The failure of the Government to call Schopick, who has pleaded guilty to the indictment, and who is under the control of the Government, permits the jury to draw the inference that his testimony would support the testimony of the defendant, Halperin, insofar as that defendant's testimony concerns conversations and dealings with Schopick in the absence of anyone else.

21. That the jury must entirely disregard Exhibits Nos. 66 to 70 because they are not properly, legally or completely connected with either defendant, Halperin, or defendant, Grunewald.

22. That as to Exhibits 66 to 70, the record clearly demonstrates that they were not signed by Halperin or actually charged or paid for by Grunewald.

23. That as to Exhibits 66 to 70, the record clearly demonstrates that they are not hotel records of hotel visits by the defendant, Halperin.

24. The jury may infer that the witnesses, Schopick, Cohen and Zipser, may not have corroborated the testimony of the witnesses, Marks, Segel, Davis and Hoffman, at the trial, and more particularly, the jury may infer that the [fol. 803] said witnesses would not have corroborated the material testimony of the last named witnesses, which they were in a position to corroborate if true and, therefore, the jury would be warranted in accepting the testimony, which was adverse to the Government on the issues these witnesses might have been able to corroborate if they were called.

25. The jury in determining the issues may take the failure to controvert such testimony most strongly against the Government because of its failure to call the witnesses, Cohen, Zipser and Schopick.

26. That the evidence fails to disclose any connection between the defendant, Halperin, and Exhibits 66 to 70 inclusive.

27. That the jury must, in considering the guilt or innocence of the defendant, Halperin, disregard Exhibits 66 to 70.

MOTION TO SET ASIDE THE VERDICT AND FOR A NEW TRIAL

The defendant moves to set aside the verdict and for a new trial for the following reasons:

1. The Court erred in denying defendant's motions to dismiss the indictment made prior to the trial.

2. The Court erred in denying the motions to compel the United States Attorney to elect, made before the trial and at the conclusion of the trial.

3. The Court erred in denying the motions for acquittal made at the end of the Government's case.

[fol. 804] 4. The Court erred in denying the motions for acquittal made at the conclusion of the entire case.

5. The verdict is contrary to the weight of the evidence.

6. The verdict is not supported by substantial evidence.

7. The Court erred in admitting testimony of the witness, Davis, concerning an alleged hypothetical statement made to the United States Attorney or his Assistants in the Eastern District of New York.

8. The Court erred in denying the defendant's motions to dismiss upon the ground of the Statute of Limitations.

9. The Court erred in charging the jury, as set forth in the exceptions to the charge, and in refusing to charge the jury as requested.

10. The defendant was substantially prejudiced and deprived of a fair trial by reason of the following rulings, acts and circumstances:

(a) The Government was permitted, over objection and exception, to question the defendant concerning his claim of privilege against incrimination before the Brooklyn Grand Jury.

(b) The Government was permitted to offer, over objection and exception, evidence of another alleged independent offense.

(c) Evidence of acts and circumstances of persons in no way connected with the defendant, Halperin, were permitted in evidence against him over his objection and exception.

(d) The testimony of Pulley, Hain and Olsen was offered against the defendant although it was in no way connected with him or the claimed conspiracy.

[fol. 805] (e) Exhibits 66 to 70, inclusive, were submitted to the jury and argument was made concerning said exhibits when, as a mater of fact, they were not connected with the defendant, Halperin, in any way.

(f) Evidence of acts and declarations of alleged co-conspirators, who were acquitted and found not to be members of any conspiracy, were offered in evidence against the defendant, Halperin, and the jury was instructed that such acts and declarations were binding upon the defendant, Halperin.

(g) When the Court refused to permit the defendant, Halperin, to examine the Grand Jury testimony of the witnesses Marks, Segel, Berman and others, all of which said Grand Jury testimony was marked as Court's Exhibits.

(h) Other errors in the admission and exclusion of evidence.

11. It was error to deny the motions for a mistrial made:

(a) When the testimony was offered concerning the Glover incident.

(b) During the cross examination of the defendant, Halperin, when he was questioned about his claim of privilege under the Fifth Amendment before the Brooklyn Grand Jury.

(c) When the testimony of the alleged hypothetical statement was offered.

Dated: New York, New York, March 31, 1955

Respectfully submitted,

Henry G. Singer, Attorney for Defendant.

[fol. 806] In United States Court of Appeals for the Second Circuit

United States of America, Appellee,

against

Henry W. Grunewald, *et al.*, Appellants

Stipulation Re Exhibits

It is stipulated that the exhibits received in evidence upon the trial of the above case shall be deposited with the clerk of this Court, prior to the day upon which the appeal is to be argued, by the parties having custody of the same; that such exhibits need not be printed; but that any party intending to refer to an exhibit in brief or argument, shall either print the same in an appendix or furnish three (3) copies thereof for the use of the Court, and one copy for opposing counsel.

Dated: May 12, 1955.

Corbin, Bennett & Delehanty, Attorneys for Appellant Grunewald; Henry G. Singer, Attorney for Appellant Halperin; J. Edward Lumbard, Attorney for Appellee, United States of America.

[fol. 1] IN UNITED STATES COURT OF APPEALS,
FOR THE SECOND CIRCUIT

C 145-249

UNITED STATES OF AMERICA, Appellee,

against

HENRY W. GRUNEWALD, DANIEL A. BOLICH and MAX HALPERIN, Defendants-Appellants,

impleaded with MAX STEINBERG, HARRY T. SCHERM, MILTON HOFFMAN, IRVING DAVIS and SAMUEL SCHOPICK, Defendants.

Appendix to Brief of Appellant Bolich

STATEMENT UNDER RULE 15 (b).

The indictment, containing seven counts, was filed October 25, 1954. All defendants pleaded not guilty. Upon the Government's motion, the trial was severed as to the defendants Hoffman, Davis and Schopick. Motions to dismiss and for other relief, prior to trial, were, in substance, denied except that Count Four was dismissed on consent upon the Government's admission that the Statute of Limitations had run. The trial commenced February 7, 1955, before Judge Dawson and a jury and continued to and including March 28, 1955. At the close [fol. 2] of the Government's case, defendants' motions for judgment were granted as to Counts Three, Five, Six and Seven, except in the case of defendant Halperin, whose motion was granted only as to Count Three.

On March 28, 1955, the jury convicted Grunewald on Count One (conspiracy); Bolich on Counts One and Two (conspiracy); and Halperin on Counts One, Five, Six and Seven (the last three covering attempts to influence witnesses); the jury acquitted the defendants Steinberg and Scherm.

On April 1, 1955, Grunewald was sentenced to five years and $10,000 fine; Halperin to five years and $5,000 fine on the First Count and two years and $1,000 fine on each of Counts Five, Six and Seven, the prison sentences to run concurrently.

On April 14, 1955, Bolich was sentenced to five years and $10,000 fine on the First Count and three years and $5,000 fine on Count Two, the prison sentences to run concurrently.

The trial court granted bail pending appeal.

In order to avoid any unnecessary or repetitious printing, the separate appendix herein on behalf of the appellant Bolich incorporates the following matters by reference to the joint printed appendix of the appellants Grunewald and Halperin: (1) the indictment; (2) excerpts of testimony, motions for a mistrial, motions; (3) the charge of the court, requests and exceptions, verdict, motions on behalf of defendants, judgment; (4) requests to charge of defendant Grunewald, additional requests to charge, defendant Halperin's request to charge, additional requests to charge of defendant Halperin; (5) motion to set aside the verdict and for a new trial.

The separate appendix of the appellant Bolich also contains such other parts of the record which the appellant Bolich deems necessary fairly to present the issues on appeal.

[fol. 3] IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. C145-249

No. 60,061

UNITED STATES OF AMERICA,

v.

DANIEL A. BOLICH.

JUDGMENT AND COMMITMENT—April 14, 1955

On this 14th day of April, 1955, came the attorney for the government and the defendant appeared in person and by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury of the offense of conspiracy to defraud the U. S.

in the exercise of its governmental functions of administering the Internal Revenue Laws and of detecting and prosecuting violations thereof, and of the faithful services of employees of Internal Revenue Service T 18 Sec 371 USC T. 26 Sec 4047 (e) (4) USC as charged in cts 1 & 2 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

[fol. 4] IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE YEARS and fined $10,000 on count one. THREE YEARS and fined $5,000 on count two. Prison sentence on counts 1 & 2 to run concurrently with each other. Defendant to stand committed until fines on counts 1 & 2 are paid or otherwise discharged according to law. Defendant to remain under present bail on condition within 11 days defendant perfects his appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Archie O. Dawson, United States District Judge.

[fol. 5] IN UNITED STATES DISTRICT COURT

Excerpts of Testimony

MARJORIE SEGEL, for Government.

Cross-examination.

By Mr. Aranow:

Q. Mrs. Segel, how long had Pattullo Modes been in existence, if you know?

A. Well, it was formed, I believe, in 1930. There was a Pattullo before that.

Q. And the Modes was added on to it?

A. Yes, which I think was about 1930.

Q. But it is a firm that had been in existence for a great many years?

A. Yes.

Q. And built up a nice reputation?

A. Yes.

Q. And did a great deal of business in New York in that line?

A. Yes, sir.

Q. In May of 1947, when you first heard from Mr. Smith, what was happening with reference to your tax matters, you were very seriously concerned, were you not?

A. Yes, I was.

Q. You knew it might affect the entire existence of Pattullo Modes?

A. Yes.

Q. You knew it might affect the liberties of yourself and your associates?

A. Yes.

Q. And you were looking around for a good, reputable lawyer to represent you?

A. We should have been doing that.

Q. But you didn't?

A. We hadn't gotten to it yet. We were talking about it.

Q. When you saw this man Davis in his office, do you remember when that was, the first time, approximately?

A. Yes.

Q. When?

A. June 9th.

Q. June 9th I think is the day of the check.

A. Well, that is the first day I saw him.

[fol. 6] Q. Is that the same day?

A. Yes, sir.

Q. Had you at that time made any investigation as to the reputation of Mr. Davis as a lawyer?

A. No.

Q. Did you try to ascertain whether he was an honest lawyer?

A. No.

Q. Did you try to find out whether Mr. Hoffman was a lawyer?

A. No, sir.

Q. Do you know whether Mr. Hoffman was an accountant?

A. No, sir.

Q. Did it make any difference to you whether they were good lawyers or bad lawyers at that time?

A. At the time we felt, because of the circumstances of our being the way we were brought to them and the way they spoke, that we had no further choice. It wasn't that we chose them because they seemed like reputable lawyers.

Q. Didn't it occur to you that you could go down to Uncle Sam and tell him the truth?

A. Unfortunately, no.

Q. After six months or in 1948, I believe you hired another firm of lawyers. Is that right?

A. Yes, sir.

Q. Did you accept their retainer merely because Mr. Davis had recommended them?

A. Yes, sir.

Q. Did you make any personal investigation of those lawyers?

A. No.

Q. Did you find out who Mr. Schwaeber was?

A. I think I had heard that—I don't know whether he was a judge before that or after that.

Q. Didn't you make some inquiry about that?

A. No, sir. They told us at the time.

Q. Who is "they"—Mr. Davis?

A. Yes, sir.

Q. Did you make any other inquiry than Mr. Davis?

A. No, sir.

Q. Did you try to find out who was Mr. James Saver at that time?

A. I knew who he was.

Q. You did?

A. Yes, sir.

[fol. 7] Q. You made an investigation, did you?

A. I knew that he had been in the Department of Justice.

Q. Did you also know that he was an assistant United States Attorney in Brooklyn?

A. No, sir, I did not.

Q. Didn't you know that he was a man who tried tax cases in Brooklyn for a period of eight years?

A. No, I did not.

Q. Did you know that he had been formerly an Assistant District Attorney in Kings County?

A. No, sir.

Q. You didn't know that?

A. No, sir.

Q. About the time that Mr. Saver was engaged, there were a firm of accountants engaged?

A. They had been engaged before.

Q. They had?

A. Yes.

Q. And you paid those accountants a very substantial sum of money?

A. We paid them, yes.

Q. Do you remember the amount, please?

A. I think it was about $3500 or $5000 or $3000.

Q. Wasn't it more than $10,000, Mrs. Segel?

A. I don't think so, but it could be.

Q. You had your accountants?

A. Yes, we did.

Q. Did you ever know why this firm of accountants, Weisberg & Greenstein, was hired?

A. We were told by Mr. Davis that there was so much work involved in getting up all the figures that would have to be presented that they would have to hire an outside firm of lawyers, that it was——

Q. Accountants you mean?

A. I mean accountants.

Q. Didn't you know what they were doing on your books all the time they were there?

A. Yes, they were going over all the figures.

Q. Did Mr. Smith tell you what they were doing?

A. I don't quite understand.

Q. Did Mr. Smith ever tell you that they were getting up figures, in order to present a case of voluntary disclosure?

A. No, sir.

[fol. 8] Q. Did Mr. Davis ever tell you that?

A. No, sir.

Q. Did Mr. Saver ever tell you that?

A. No, sir.

Q. Where did you first meet Mr. Saver?

A. In Washington.

Q. Where in Washington?

A. I met him in the Department of Justice.

Q. Building. Is that right?

A. Yes.

Q. Who was with you?

A. Mr. Hoffman.

Q. Then shortly thereafter, do you know whether or not Mr. Saver appeared before Mr. Wheeler at this Ninth Avenue office?

A. I don't know about Mr. Wheeler.

Q. You don't know what happened over there?

A. I know now that he was connected with this voluntary disclosure.

Q. Did you know that Mr. Smith had testified to that? Did you know that Mr. Smith had testified before Mr. Wheeler with reference to voluntary disclosure?

A. I know that now, yes.

Q. Did you know that Mr. Saver had prepared and filed a brief?

A. No, sir.

Mr. O'Hara: I think we are bordering on testimony from counsel at this point.

The Court: That is not evidence, those questions.

Mr. Aranow: I am asking her whether she knew that.

The Court: The fact that counsel states those as questions is no indication that that is so.

Mr. Aranow: I am asking this lady if she knew.

The Witness: No, sir, I did not.

Q. Did you know that Mr. Saver appeared at 253 Broadway?

The Court: Objection sustained. You can't put in a lot of evidence by asking if the witness knows certain [fol. 9] things. Let us hear other ways than that.

Q. Did you know that Mr. Saver filed a brief at 253 Broadway?

Mr. O'Hara: I think this is the same thing over and over again.

The Court: You know that is not the correct way to get in things like this. You can ask her what she knew about what Mr. Saver did.

Q. Did you know that Mr. Saver claimed that there was a voluntary disclosure?

The Court: Yes, you can ask her that.

A. No, sir, I did not.

Q. Did you know a person by the name of T. Vincent Quinn?

A. No, sir.

Q. Never heard of him?

A. I have heard of him now, yes. I did not know of him at that time.

Q. Was he a member of the firm of Schwaeber, Saver & Quinn?

A. I believe he became a member after.

Q. Do you know whether or not Mr. Saver and Mr. Quinn went to Washington in connection with this case?

A. I do not.

Q. Were you ever told that Mr. Quinn and Mr. Saver were there on November 4, 1949?

The Court: Objection sustained. She says she was never told they went there. How can she tell whether they were there on a particular day?

Mr. Aranow: I respectfully except.

The Court: You have your exception.

[fol. 10] Q. I believe you testified that Mr. Clayton was in your office or in your place of business some time in the middle of November of 1948. Is that correct?

A. It was the end of 1948. I was not sure of the time.

Q. Did Mr. Saver speak to you about Mr. Clayton coming there?

A. No, sir.

Q. Did Mr. Davis speak to you about Mr. Clayton coming there?

A. Yes, sir.

Q. Didn't Mr. Davis tell you that Clayton was there because Mr. Saver requested it?

Mr. O'Hara: I object to this. We are going through the same thing again and again.

Mr. Aranow: Not again and again. This has never been touched on by anyone.

Mr. O'Hara: If he wishes to ask this witness what conversations she ever had with Mr. Saver, I have no objection whatever, but I do object to this form.

The Court: The objection which is made is that you are conveying the impression by your questions of a lot of facts which are not in evidence. If you want to ask about certain things, ask about them, but don't put a question to which the witness can answer no that gives the implication that that is testimony in the case.

Q. Did Mr. Saver ever tell you that he requested Mr. Clayton to come to your office?

The Court: I will allow that question.

A. No, sir, he did not.

Q. Did Mr. Davis ever tell you that Mr. Clayton was there at the request of Mr. Saver?

A. I don't recall such a statement.

[fol. 11] Q. Were you told in the middle of November 1948 by either Mr. Davis or Mr. Saver that you ought to cooperate and to help the Government in every possible way in making full disclosure?

A. We were told that by Mr. Davis.

Q. When was that? Do you remember?

A. Towards the end of the year.

Q. Around November 15th?

A. Or end of November, in there somewhere.

Q. Wasn't that before Mr. Clayton came in?

A. Mr. Clayton came in on the heels of that statement.

Q. Mr. Saver was present in the office of Mr. Baradell when you were there on the 10th of January, 1949?

A. Yes, sir.

Q. And represented you at that time?

A. Yes, he did.

Q. And represented the members of your firm?

A. Yes, sir.

Mr. Aranow: That is all.

* * * * * * * * *

Mr. MacMahon: I understand, but will you please listen for a moment. In that connection the Government has no intention of calling these taxpayers. We are informed that they planned to leave and go out of the country tomorrow.

The Court: You mean the Clover people?

Mr. MacMahon: Yes. Now in the event that the defendants wish to call them, and to avoid any charge that we didn't call them——

Mr. Aranow: That is too big hearted for the gentleman. [fol. 12] The Court: Go ahead, Mr. MacMahon.

Mr. MacMahon: We would like to be able at this time to state that they are in New York, that we will make their address available to them, and if necessary will serve subpoenas in their behalf.

Mr. Aranow: I move to strike that out as being an entirely improper statement in the hearing of the jury, and I ask for the withdrawal of a juror and a mistrial on the ground of that improper statement.

The Court: Your motion is denied.

Mr. Aranow: I respectfully except.

Mr. Rosenblum: I object on the ground that now Mr. MacMahon is putting us in this position: he is making it appear that if we don't call these people we are afraid to call them.

The Court: No, no, Mr. Rosenblum. You get very excited about something so far as I can see that doesn't affect your client.

Mr. Rosenblum: However, we are still in the case——

The Court: The motion is denied: The documents are received in evidence. * * *

(Government's Exhibits 45, 46, 47 and 48 for identification received in evidence.)

* * * * * * *

EVERETT HARDING, for Government:

Cross-examination.

By Mr. Aranow:

Q. Mr. Harding, with reference to the suite 319-320-321, I believe you testified there was a foyer and there were three separate doors leading to each one of the rooms—[fol. 13] the bedroom, that parlor as they call it, and to the other bedroom. Is that correct?

A. Yes, sir, there are five doors in the suite.

Q. How many keys were there to that suite?

A. Sometimes there may be one key in a mailbox. There may be two. I have seen as high as four or five.

Q. The person using room 319, the key admitting you to 319 would admit to the foyer. Is that right?

A. Yes, sir.

Q. Would that same key admit you to the parlor, do you know?

The Court: Do you have to have a key to get from the foyer to the parlor?

A. There is a connecting door which there is a special key for.

Q. Or would the key to 319 admit you to room 321?

A. 319 would not, no, sir.

Q. The key to 319 would admit you to the foyer, the main hall and into 319?

A. Yes, sir.

Q. And that is all?

A. Those two doors.

Q. Do you recall prior to the time that Mr. Bolich moved into 319 or 320, he had occupied a room—I think it was known as 851? Do you remember that?

A. Only by what the records show. There was such a record.

Q. I show you this exhibit——

The Court: The exhibit is in evidence. It shows what the facts are about that, I take it.

Mr. Aranow: I understand.

Q. Do you remember what rate Mr. Bolich was charged for room 851?

A. No, sir, I don't without looking at it.

Q. Is there any way you can refresh your memory?

[fol. 14] The Court: Just let me ask that, Miss Goldman. Is that on the bills?

Miss Goldman: Yes.

The Court: They are in evidence.

Miss Goldman: Well, some of the bills.

The Court: If not, they can be put in evidence fast enough.

Mr. Aranow: All right. I just want to know what the rate is for 851.

Miss Goldman: I suggest we put this in evidence.

Mr. Aranow: I just want to know the rate.

The Court: You and Miss Goldman look at it and see if you can stipulate what the rate is.

Mr. Aranow: $6.50.

The Court: $6.50 a day. All right, that is agreed. Does that accord with your understanding of what the rate was?

The Witness: Yes.

Miss Goldman: Also there is a notation on the record that that was a special rate.

The Court: All right.

Q. Now, 851 was a room way in the back of the hotel to the very rear of the hotel, going towards the opposite end of the hotel. Isn't that so?

A. That is correct.

Q. And it was practically over the restaurant, wasn't it, of the Occidental Hotel?

A. It was the Childs Restaurant then.

The Court: What floor was the Childs Restaurant?

The Witness: That came up to the third floor.

The Court: This was the eighth floor?

The Witness: Yes.

[fol. 15] Q. When Mr. Bolich went down to 319 and 320, did he have a conversation with you as to why he went down to 319 from 851?

A. Not with me.

Q. Are you sure?

A. I am positive.

Q. Didn't you ask him why he and Mrs. Bolich moved down below and what was the purpose and the reason for it?

A. No, sir.

Q. Let me see if I can refresh your memory. Didn't he tell you at that time——

The Court: He says he didn't have any conversation. If you are going to refresh his recollection, do it by not repeating what you think he might have said.

Q. Did he tell you at that time that there was a great deal of noise in the back court in that room 851, and they heard the noise from the restaurant?

Miss Goldman: Your Honor, Mr. Aranow is testifying?

The Court: Objection sustained.

Did he have any conversation with you as to the reasons he moved?

The Witness: I do not recall any conversations.

The Court: Objection sustained.

Mr. Aranow: I respectfully except.

The Court: All right, your objection is noted. You can ask him whether he discussed the noise in the room.

Q. Did you discuss the noise in the room in 851?

A. Well, sir, that could be possible, but I don't recall any conversation.

Q. Did he discuss with you the price of the room of 851 as compared with——

A. Not with me, no, sir.

[fol. 16] Q. Did he say to you anything about he and Mrs. Bolich desiring to have increased space?

Miss Goldman: Objection.

The Court: Objection sustained.

Mr. Aranow: I respectfully except.

Q. Did he say anything about space, more room?

A. In Mr. Bolich's conversation by long distance phone there was, in that conversation——

Miss Goldman: May we fix the time of this?

The Court: What time was that?

The Witness: That was December 20, 1951, the conversation I am speaking of by long distance.

The Court: That was long after he had moved out?

The Witness: Yes, sir. He mentioned the fact that they had moved into the suite in order to have the advantage, I think it was, of the larger space.

Q. Anything said about the price also?

Miss Goldman: Your Honor, again, may we fix the time of this?

The Court: I take it this was the same time?

Q. The same time?

A. The price, sir, I don't recall any conversation on that, sir. It might have been. I can't recall.

Q. Did Mr. Bolich ever tell you that he paid all of his bills?

A. Mr. Bolich did say in the same conversation to me that he had paid all of his bills while in the suite.

Q. Going to the time when you say he asked you to see certain records, which you described here, the records [fol. 17] from June 1949 to 1950—do you remember that incident?

A. Yes.

Q. At that time your office was in the back of the general office in the hotel, is that correct?

A. That is correct, sir.

Q. And you had several desks in there in that small room?

A. There were two desks at that time.

Q. That is, Mr. Rhoades——

A. No, Mr. Rhoades and my desk were one and the same. There was a secretary's desk off to the left of the office.

Q. At the time when you gave Mr. Bolich those slips, those bills, or whatever they were, did you leave him in the room? Did he remain in the room?

A. I handed these records to Mr. Bolich in the office, sir.

Q. And did he remain in the room?

A. No, sir. Mr. Bolich went out.

Q. Did you go out?

A. No, sir, I went out in the front office, as I recall.

Q. Do you know whether Mr. Bolich went back to the office and sat down and examined those records?

A. I do not, sir.

Q. Do you know whether or not he left them on Mr. Rhoades' desk or your desk?

A. I do not know that, sir, no.

Q. Do you remember in your conversation with him on the telephone he made the statement to you that he did see these records, but he had not taken them out of the room?

The Court: Sustained. Ask him what he said.

Q. What did he say with reference to taking these records out of the room?

A. Well, he said that he knew he had not taken them to his room or away from the desk, as I recall the statement.

Q. What else did he say? Did he say anything about leaving them anywhere?

A. He said it was possible that he left them or could [fol. 18] have left them on Mr. Rhoades' desk or at the desk. He knew he hadn't taken them away from the desk, meaning the front desk, I assume, nor to his room.

Q. Now, in the same conversation he told you about certain vouchers, that you could get the same data from vouchers?

A. I believe Mr. Bolich, I know he asked me, he asked me if there were other records. I said yes, I had seen a record where he and Mrs. Bolich had moved into Mr. Woodring's suite.

Q. Now I am talking about the items, those that were missing.

A. And Mr. Bolich—during the conversation I said, "All the voucher records have been discarded," or words to that effect, "by the auditor."

Q. By whom?

A. The auditor of the hotel, and that left us no records whatsoever.

Q. When was that done when you had discarded those records?

A. Well, that, sir, I don't know.

Q. Was that done at Mr. Bolich's request?

A. Sir?

Q. Was that done at Mr. Bolich's request?

A. Certainly not.

Q. That was done in the usual course of business of the hotel?

A. Usual course of business, yes, sir.

Q. Was that done merely as to these records or all records of that nature?

A. All voucher records, sir. I think they are destroyed about every two years. The larger bills are kept five years, such as in evidence here.

Q. In 1951 when you say you wrote the letter—do you remember that?

A. Yes, sir.

Q. Did you write that letter at the request of anyone?

A. The letter was written in the manager's office. I signed it, sir.

Q. It was written by whom?

A. Mr. Miller, the manager.

[fol. 19] Q. Did anyone request him to write that letter?

A. I do not know that, sir.

Q. Did you actually have need of those records from June, 1949, to June, 1950?

A. Only by the subpoena.

Q. Outside of the subpoena, did your hotel have any need for those records?

A. No, sir.

Q. And did anyone tell you to make a record of the conversation with Mr. Bolich?

A. I mentioned the fact that Mr. Bolich had called me on the phone to Mr. Miller, the manager of the hotel. Mr. Miller suggested that I call the King Committee right away and tell them of the telephone call, which I did. I forget which person it was. I believe it was Mr. Taylor, or Mr. Reardon. I don't know which, that said, "While it is fresh on your mind sit down and make a copy of that conversation."

Q. And that was done how many days after the conversation?

A. Approximately three days.

Q. Did you see Mr. Bolich around the hotel or anywheres near the hotel during the daytime during that period?

A. I don't even remember, no, sir, seeing him.

Q. Did you see him there at nighttime?

A. Occasionally I would see him come in, and as I recall he would go to the newsstand and buy a newspaper and go on to his room.

Q. And usually at what hour?

A. Well, the exact hour I don't know but it was, as I recall, most times it was around 6 o'clock, 7, something like that, Within that——

Q. Period.

A. —period, yes, sir.

Q. Now, what time of the day did Mr. Grunewald go to the suite, 319 or 419 or whatever it was?

A. Well, as I recall Mr. Grunewald coming and going, Mr. Grunewald came and went at most any hour.

Q. Did you see him there at night except when he was there with his wife?

A. No, sir. May I respectfully ask you to ask that question again?

[fol. 20] (Last question read.)

The Witness: Mr. Grunewald?

Q. Yes.

A. Oh, yes, I have seen Mr. Grunewald there at night.

Q. When Mr. Woodring was there?

A. Well, I think—I can't answer that, sir. I don't remember.

Q. Isn't it a fact that as a rule he went home around the evening time? Isn't that so?

The Court: Do you know?

The Witness: I have no way of knowing that, sir. There is no way I could tell you that, unless I could remember some specific incident or time, rather, but I don't.

Q. Did you know Mr. Grunewald's secretary?

A. No, sir, I can't recall the name.

Miss Goldman: Your Honor, this witness has already testified that he didn't know whether or not there was a secretary.

The Court: Do you know whether there was a secretary in that suite?

The Witness: I don't recall, sir, I am sorry.

Mr. Aranow: That is all.

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DANIEL OLSEN, for Government.

Cross-examination.

By Mr. Aranow:

Q. Do you know Mrs. Bolich?

A. I know not too well.

Q. Do you know whether Mr. Bolich has a home elsewhere than in Brooklyn?

A. No, I don't.

Q. Did they tell you that they go away from there [fol. 21] sometimes and leave the house alone for quite some period of time?

A. No.

Q. Do you know whether or not Mr. Bolich or Mrs. Bolich said anything to you about keeping some documents and papers safe?

A. Yes, according to what I said, yes.

Q. And all you did, as I understand it, is cut an opening in the base and put it right back. Is that correct?

A. Right.

Q. Did you see any documents at that time in there?

A. No, I didn't see any.

Q. Did he show you any documents anywheres else?

A. No, he did not show me any.

Q. How long did you work there, sir?

A. I was there—it could be less than half a day. I marked down four hours for the time I was there.

Q. Four hours' work on that?

A. Yes.

Q. And that was September 28, 1950. Is that correct?

A. September 28.

Q. 1950?

A. Right.

Q. Do you know whether or not Mr. Bolich was still in Washington, working in Washington, in September of 1950?

A. I did not know that, no.

Mr. Aranow: That is all.

[fol. 22] BOLICH'S MOTION FOR JUDGMENT OF ACQUITAL AND TO STRIKE OUT CERTAIN TESTIMONY AND DENIAL THEREOF.

Mr. Aranow: On behalf of the defendant Daniel A. Bolich I respectfully move this Court pursuant to Rule 29 of the Federal Rules of Criminal Procedure for judgment of acquittal upon the following grounds:

1. At the close of the case all the evidence is insufficient to sustain a conviction of the offenses charged in counts 1 and 2 of the indictment for the reasons that:

(a) There is no substantial evidence against the defendant Bolich that a conspiracy existed as charged in the indictment.

(b) There is no substantial evidence to show that if such a conspiracy existed, the overt act alleged in count 1 charged to the defendant Daniel A. Bolich, namely, that on or about December 20, 1951, Bolich had a telephone conversation with Harding, was committed in furtherance of such conspiracy.

(c) There is no substantial evidence to show that defendant Bolich was one of the conspirators.

(d) There is no evidence that Bolich knew the scope or plan of the alleged conspiracy charged.

(e) There is no evidence that Bolich acted with a participating intent in the alleged conspiracy.

(f) The evidence is insufficient to overcome the legal presumption that a public officer properly discharges his duty in public office.

(g) There is no direct evidence upon which the jury would be warranted in drawing any inference as to the defendant's guilt.

[fol. 23] (h) The evidence is insufficient to sustain a conviction of the offenses charged in the indictment since there is no evidence that Bolich joined in any agreement to defraud the United States in the exercise of its governmental functions.

And I cite the case of Curley v. United States, 160 Fed. 2nd, 299, at page 232, and the case of Farr Co. v. Union Pacific Company, 106 Fed. 2nd, 437, at page 439, and Isbell v. United States, 227 Fed. 788.

The Court. Your motions are denied.

Mr. Aranow: And I specifically ask that the overt acts relating to the telephone conversation of Harding not being pursuant to a conspiracy be withdrawn.

The Court: Motion denied. That is a matter on which the jury will have to pass.

Mr. Aranow: Now, in view of the Court's ruling heretofore made that the substantive counts be dismissed against the defendant Bolich, the defendant Bolich is entitled to have a dismissal of—

I. The allegations of the indictment relating to the commission of certain offenses against the United States, which include the substantive counts above mentioned, and

II. In view of the fact that the language of count 1 of the indictment and count 2 of the indictment relating to the alleged conspiracy to defraud the United States in the exercise of its governmental functions is identical in both counts 1 and 2, this Court should dismiss either count 1 or count 2 on the ground of duplicity and submit to the jury only one of said counts relating to the defendant Bolich.

The Court: Your motion is denied on the ground that the two counts involve alleged violations of two separate statutes and therefore are two separate crimes.

[fol. 24] Mr. Aranow: From an examination of the allegations of the indictment in counts 1 and 2, the Court may see:

I. That the period of time charged, namely from January 1, 1946, to the date of the indictment is identical.

II. That the defendant Bolich is included in both counts.

III. That the conspiracy to defraud the United States in the exercise of its governmental functions is identical and that the same reference is made alleging that the defendant Bolich would render corrupt decisions in pending matters.

Now, furthermore, on behalf of the defendant Bolich I respectfully move this Court to strike out the testimony of the Government witness Daniel Olsen, who testified at pages 3378 to 3384 inclusive, on the ground that it appears from the witness' testimony that he performed certain work at Bolich's home on September 28, 1950, which

was long after the events charged in the indictment and such testimony is, therefore, irrelevant, incompetent and immaterial and too remote to have any probative value in this case.

The Court: The indictment charges that the conspiracy continued to the date of the indictment. I think, therefore, that evidence, for such weight as the jury wishes to give it, is competent evidence within the period of time alleged in the indictment.

Motion denied.

Mr. Aranow: I respectfully except.

* * * * * * * *

[fol. 25] RULINGS ON BOLICH'S REQUESTS TO CHARGE

The Court:

I will now pass upon the requests to charge submitted by Mr. Aranow on behalf of the defendant Bolich.

I deny requests 7, 9, 19, 21, 22, and 23. As to the other proposed requests to charge I deny them in the form stated.

Mr. Aranow: I respectfully except.

The Court: Mr. Aranow also submitted additional requests to charge No. 29. I deny that request.

Mr. Aranow: I might say, your Honor, the information upon which I base that request will be forwarded to me from Washington some time today. They said they couldn't get it before tomorrow morning, but I want to submit that instead of the one I gave you.

The Court: If at any time you have something which will support that I will be glad to have it. I was particularly concerned about your statement that the Assistant Commissioner was not charged with the responsibility of prosecuting criminal income tax frauds. I think it is a rather ambiguous statement. He may not have had the direct responsibility but he may have had a responsibility in connection with the processing or in the department which might lead to it.

Mr. Aranow: He had the responsibility of processing in the department but not the prosecution of criminal cases.

The Court: But that would be a little ambiguous. I therefore deny it as requested.

[fol. 26] REQUESTS FOR INSTRUCTIONS SUBMITTED BY DEFENDANT DANIEL A. BOLICH

Pursuant to Rule 30 (Federal Rules of Criminal Procedure) the above named defendant respectfully requests that the Court instruct the jury on the law as set forth herein:

1. The jury is not to be influenced by the fact that the Court refused to dismiss the indictment or grant the defendant's motion for judgment of acquittal, as such refusal simply means that the facts are to be decided by the jury.

2. Neither is the jury to be influenced by the disposition which the Court has made of any motion during the trial, or of any rulings concerning the admission or exclusion of evidence, as that imports no opinion by the Court as to the guilt or innocence of the defendants.

3. The jury should not regard the fact that the defendants are indicted as having any bearing whatever on the merits of this case. The indictment against the defendants is no evidence of guilt and carries with it no presumption of guilt. No juror should permit himself to be to any extent influenced against the defendants because or on account of the indictment. The indictment does not detract in any way from the presumption of innocence with which the law surrounds the defendants.

4. The jury should not take into consideration the fact that the defendant BOLICH has failed to testify as a witness in his own behalf and the jury are further instructed not to allude to this fact in their deliberations in arriving at a verdict.

[fol. 27] 5. The fact that any defendant did not testify cannot be considered by you as any evidence against him or against any of the other defendants or as a basis for any presumption or inference unfavorable to him or to them. You must not permit such fact to weigh in the slightest degree against any defendant, nor should it enter into your discussions or deliberations in any manner. The prosecu-

tion must prove defendants guilty by the required proof beyond a reasonable doubt as explained to you. The defendants are not required under our law to establish their innocence.

6. The burden of proof resting upon the government is determined not by the number of witnesses or the amount of the testimony, but by the nature and quality of that testimony.

7. The government evidence consists almost wholly of testimony of persons alleged by the government to be co-conspirators. A co-conspirator would, as a matter of law, be regarded as an accomplice.

8. The self-confessed accomplices, upon their confession and admission of participating in the perpetration of the crime charged in the indictment, stand contaminated with guilt and it is the duty of the jury, in weighing and considering such testimony, to take into consideration the fact that such accomplices have either pleaded guilty to the original indictment or gained immunity from prosecution thereunder and may have testified before you from motives of reward or expectation of leniency. In applying the test of credibility to the testimony of such accomplices, it is the duty of the jury to consider the same with grave care and caution before acting on it, and if, after considering such testimony, the jury were not satisfied beyond a reasonable doubt of the truth of same against the defendant [fol. 28] BOLICH, they should not in any way permit such testimony to influence their verdict against the defendant BOLICH.

9. The testimony of alleged accomplices should ordinarily not be accepted unless corroborated by independent proof. If two or more accomplices are produced as witnesses, they are not deemed to corroborate each other; but the same rule applies and the same corroboration is required as if there were but one.

10. If you believe that any witness deliberately testified falsely concerning any material fact, you may, if you see fit, disregard all of the witness' testimony.

11. The plea or admission of guilty in this case by the self-confessed accomplices does not create any presumption that the other defendants on trial are guilty. It

should not be considered by you as having any probative value at all to establish the guilt of the defendants on trial.

12. The fact that the self-confessed accomplices are named as co-conspirators in the same indictment with the other defendants and that they have either pleaded guilty to the charge or gained immunity of prosecution thereunder is no proof that the crime set forth in the indictment was committed and is no proof that any of the defendants who went to trial had anything to do with the commission of the crime charged in the indictment.

13. The defendant is entitled to every inference in his favor which can be reasonably drawn from the evidence, and where two conclusions may be drawn from the same facts, the one favoring the defendant's innocence and the other consistent with guilt, the law makes it your duty and obligation to accept the conclusion towards innocence and to acquit him.

[fol. 29] 14. A probability of innocence is the equivalent of a reasonable doubt and requires the acquittal of the defendant.

15. Suspicion is not sufficient to sustain a conviction.

16. It is the duty of the jury to deal with each defendant separately and in considering the evidence should treat the defendants as though they were on trial separately; the jury must separate the evidence as to each defendant, considering in the case of each separate defendant, only the evidence admitted against that defendant and must obey the Court's instructions given during the trial regarding such evidence as was received only as against one defendant and not as against the other.

17. Evidence of mere acquaintanceship or even of mere association does not establish a conspiracy. The jury cannot find any defendant in this case guilty of the crime charged against him merely from the fact—if you find it to be a fact—that he associated with any other defendant or defendants whom you may find guilty of the offense charged.

17a. The fact that the defendant Bolich lived in a hotel with the co-defendant Grunewald is not evidence of an intent to participate in a conspiracy and is not a circum-

stance from which participation in a conspiracy is to be presumed.

18. You may not presume the existence of a fact and then infer from such presumed fact the existence of any other fact or circumstance; nor may you infer from any presumed fact or facts that the defendants, or any one of them, are guilty of the offense alleged in the indictment.

19. The existence of the conspiracy charged cannot be established against an alleged conspirator by evidence of [fol. 30] the acts or declarations of his alleged co-conspirator done or made in his absence.

20. The jury must first determine from all the evidence in the case, whether or not a conspiracy existed. If you decide that a conspiracy did exist, you must next determine as to each defendant separately, whether he was a member of the conspiracy. In considering whether or not a particular defendant was a member of the conspiracy, you must do so without regard to and independently of the statements and declarations of others. Membership of a particular defendant in a conspiracy must be determined from the evidence of the alleged member's *own* actions, his *own* conduct and his *own* declarations or his *own* statements and his *own* connection with the actions and conduct of others.

21. There is a presumption that public officers or government officials perform their duty and do not exceed their lawful authority.

22. The advice given to Quinn and Saber by the defendant Bolich or the direction given by Bolich to Baradel that if a taxpayer co-operated with the Government and made full disclosures he would receive consideration is no evidence of conspiracy nor does it show a participating act by Bolich in any conspiracy.

23. The failure of proof of the second part of the first count of the indictment constitutes a modification of the entire charge of the Government and really spells out a conspiracy wholly different and independent from the one originally charged.

24. While it is the duty of a juror to discuss and consider the opinions of the other jurors, a juror must decide the case upon his or her own opinion of the evidence and

[fol. 31] upon his or her own judgment and conscience, and not that of the other jurors, even against a large majority of the other members of the jury.

25. While it is true a question of fact may be determined by the jury from circumstantial evidence there are two general rules which must be observed by the members of the jury in determining a question of fact from circumstantial evidence: namely 1—The hypothesis of guilt should flow naturally from the facts proved, and be consistent with them all. 2—The evidence must be such as to exclude to a moral certainty every hypothesis but that of the defendant's guilt of the offense imputed to him, or in other words, the facts proved must be consistent with and point not only to his guilt but must be inconsistent with his innocence.

26. I further charge you that where in a criminal case the Government's proof depends upon circumstantial evidence, before such circumstantial evidence can be given legal effect or considered by you, it must be such evidence that satisfies each of you beyond a reasonable doubt that the facts from which you are asked to draw the inference of guilt, have themselves been proven to your satisfaction beyond a reasonable doubt and such facts cannot be assumed by you.

27. The inference to be drawn from these facts, if they have been proven to your satisfaction to exist, must be clear and strong and point logically to the guilt of the particular defendant to which you are applying them and exclude to a moral certainty every other reasonable hypothesis or theory. If they fail to do so, then the Government has failed to prove the guilt of such particular defendant and your verdict should be one of not guilty.

28. With respect to the advice given by the defendant Bolich to Quinn and Saber or his direction to Baradel that [fol. 32] if a taxpayer co-operated with the Government and made full disclosures, he would receive consideration, you must bear in mind that you are not sitting here in judgment upon matters of policy in the administration of the internal revenue laws by a government official, or are you to inquire whether or not the defendant Bolich acted prudently in such advice and direction. As jurors you are to determine, however, whether the defendant Bolich in giving

such advice or direction acted wilfully, knowingly, unlawfully, feloniously and corruptly as a member of this alleged conspiracy and with the object of furthering its purpose and carrying it into execution.

Additional Request for Instructions on Behalf of Defendant Bolich

29. The jury is instructed that under the provisions of law (Chapter 39 Internal Revenue Law, Sec. 3905-3906) it was the duty of the Assistant Commissioner of Internal Revenue in charge of Operations, among other things to have authority over and responsibility for all personnel actions, policies and programs in connection with the administration of his office, but he was not charged with the responsibility of prosecuting criminal income tax frauds. That function rested with the Department of Justice and eventually with the United States Attorney's office. You are, therefore, instructed that you are not, as jurors, to determine whether the defendant Bolich acted wisely or unwisely with respect to his advice or his direction but you are to inquire whether he acted with guilty and corrupt purpose as alleged in the indictment. If you find that the defendant Bolich acted honestly and in good faith or you have a reasonable doubt thereon, even though he may have erred in his judgment, your verdict must be not guilty as against the defendant Bolich.

[fol. 33] Bolich's Motion to Set Aside Verdict and for a New Trial

The defendant, Daniel Bolich, moves the Court to grant him a judgment of acquittal and a new trial for the following reasons:

1. The Court erred in denying defendant's motion for judgment of acquittal, made at the conclusion of the prosecution's case and renewed at the conclusion of all of the evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is not supported by substantial evidence.

4. The Court erred in denying and sustaining objections to questions addressed to the witnesses for the prosecution.

5. The Court erred in admitting and excluding testimony of the witnesses over the objections made by the defendants.

6. The Court erred in charging the jury in the manners pointed out at the conclusion of the charges and refusing to charge the jury as requested by the defendants before the charge was made and particularly with reference to charge made regarding circumstantial evidence.

7. The Court erred in submitting to the jury for its consideration both Counts 1 and 2 relating to the defendant, Daniel Bolich, and further erred in its charge to the [fol. 34] jury as to the purpose and intent of Title 26 U. S. C. Section 4047 (e) 4.

8. The defendant was substantially prejudiced and deprived of a fair trial by reason of the following:

(a) The attorney for the government in his arguments misstated facts in contradiction of the evidence, appealed to class distinctions and the passions of the jury, applied improper epithets to the defendant and appealed to the bias and prejudice of the jury.

(b) The Court erred in its refusal to permit counsel for the defendants to interrupt summation of the attorney for the United States when he made a misstatement of fact and to permit the correction thereof immediately at such time and instead directed that a written memorandum be submitted at the conclusion of the summation embodying the mis-statement of facts challenged and pointing out the corrected statements and that by reason thereof the very intent and purpose of spontaneous correction of mis-statement of fact were completely lost and when submission of statements were made to the Court more than 70 hours afterwards, the Court disregarded the requests made by the defendant, Daniel Bolich.

(c) That the Court, after being assured that in view of the defendant's illness a stipulation would be filed permitting the trial to continue in the absence of the defendant, made comments in the presence of the jury from which the jury was led to believe that the defendant's absence was unjustified and that he was

a malingerer and feigned illness, all this to the prejudice of the defendant.

[fol. 35] 9. The Court erred in denying the defendant's several motions made to strike certain evidence and for a mis-trial.

10. The Court erred in its rulings on the motions for mis-trial made on behalf of the defendants, Grunewald and Halperin, in which the defendant, Bolich, joined, and on all other motions made by the defendants during the trial.

Robert Callahan, Attorney for Defendant, Daniel Bolich.

Frank Aranow, of Counsel.

BOLICH'S MOTION IN ARREST OF JUDGMENT

The defendant moves the Court to arrest the judgment for the following reasons:

1. The indictment does not state facts sufficient to constitute an offense against the United States.

2. This Court is without jurisdiction of the offense, in that the offense, if any, was not committed in this district.

Robert Callahan, Attorney for Defendant, Daniel Bolich.

Frank Aranow, of Counsel.

[fol. 36] JUDGMENT

The Court: Does Mr. Bolich wish to say anything before I pronounce sentence?

(No response.)

The Court: The imposition of sentences in these cases is one of the serious and solemn duties of a judge, which I give a lot of consideration, and prayer and thought, I may say.

We had in this case a seven-weeks' trial. The defendant was represented by able counsel. The charge was not

that the defendant abused his discretion. The charge was that he was part of a criminal conspiracy. The jury, after consideration, convicted Mr. Bolich and two of the alleged conspirators, Mr. Grunewald and Mr. Halperin. I think the evidence thoroughly justified the verdict of the jury. If I had been sitting on the jury, I would have reached the same conclusion.

Now, the question of sentence. I was thinking this morning that tomorrow, April 15th, tens of millions of citizens throughout this entire country will be filing their income tax returns, and all of them, rich and poor, will have paid a substantial part of their earnings to the Federal Government for income tax purposes. Those citizens are entitled to an assurance that the laws under which they pay these income taxes will be administered honestly and not for the personal profit of officials in the Internal Revenue Service.

Mr. Bolich was not a minor official. He was second in command of the entire Internal Revenue Service of the United States. By virtue of that high position, he had an added responsibility. For high officials of the Internal Revenue Service to do other than administer those laws honestly is to betray their country just as much as if they betrayed it on a battlefield.

I am deeply sympathetic with Mr. Bolich's physical condition, but I think that in a case as flagrant as this, the [fol. 37] Court owes a duty to the country and to the taxpayers to see that the penalty which is imposed will stand as a warning to people in Government service that never should they succumb to the temptation to sell out their country for their own personal gain.

It is the sentence of the Court that on the first count of the indictment, the defendant shall be committed for five years and fined $10,000.

On the second count, it is the sentence of the Court that the defendant shall be committed for three years, the sentence to run concurrently with that imposed on the first count, and in addition, on the second count, the defendant shall be fined $5,000. The fines shall be committed fines.

[fol. 1] In United States District Court, Southern District of New York

C. 145-249

United States of America

vs.

Henry W. Grunewald, Daniel A. Bolich, Max Steinberg, Harry T. Scherm, Max Halperin, Milton Hoffman, Irving Davis and Samuel Schopick

Before: Hon. Archie O. Dawson, *District Judge*, and a Jury.

New York, February 7, 1955;

10:30 o'clock a. m.

Excerpts from Testimony

Appearances:

J. Edward Lumbard, Esq., United States Attorney for the Government;

By Lloyd F. MacMahon, Esq., Alfred P. O'Hara, Esq., Howard A. Heffron, Esq., Clarence C. Ferguson, Jr., Esq., and Miriam Goldman, Esq., Assistant United States Attorneys.

Edward Bennett, Esq., and Harold H. Corbin, Esq., Attorneys for Defendant Henry W. Grunewald.

[fol. 2] Robert Callahan, Esq., Louis Kaplan, Esq., and Frank Aranow, Esq., Attorneys for Defendant Daniel A. Bolich.

Garey & Garey, Esqs., Attorneys for Defendant Max Steinberg; Jacob J. Rosenblum, Esq., and Edward T. Perry, Esq., of Counsel.

Murray E. Gottesman, Esq., Attorney for Defendant Harry T. Scherm.

Henry G. Singer, Esq., Attorney for Defendant Max Halperin.

HERMAN DEUTSCH resumed the stand.

Direct examination (continued).

By Mr. Ferguson:

Q. Mr. Deutsch, did there come a time when you were subpoenaed to appear before a grand jury?

A. Yes, sir, in 1952 I believe. It was the same time that Mr. Hoffman got a subpoena.

Q. Keep your voice up, please.

A. Yes, sir, I believe it was 1952. I got a subpoena to appear before the Brooklyn Grand Jury.

[fol. 3] Q. What did you do as a result of getting that subpoena?

A. The subpoena came to me at night. Immediately upon receipt of it, I was supposed to answer the subpoena the following day, as I remember, and I called Mr. Hoffman on the phone.

Q. Did you call him at his home?

A. Yes, sir, I did.

Q. Did you recognize the voice?

A. Yes, sir, I did.

Q. What was the substance of that conversation?

A. I said to him——

Mr. Rosenblum: I object to that, if your Honor pleases. I think it is quite clear that this is out of the presence of the defendants, and it is a conversation between this man and another person.

The Court: This is a conversation with a man who is named in the indictment as a conspirator but is not a defendant in this case. The evidence will be admitted subject to connection. If it is not connected with any of these defendants, the evidence will be stricken out, and of course the jury will realize that evidence of conversations with Mr. Hoffman is not binding upon these defendants unless it should be established that Mr. Hoffman and the other defendants were a party to a conspiracy such as is charged in the indictment.

Mr. Rosenblum: I respectfully except.

Q. Now, you were telling us you called your brother-in-law.

A. Yes, I did. I called him and told him that I just received a subpoena to appear tomorrow morning, I think it was, at the Brooklyn Grand Jury. I said, "What is this about and what am I supposed to do?"

[fol. 4] He said, "Well, I got one, Mr. Schopick got one, and Mr. Davis got one." He says, "Just sit tight. I will be over to see you in a few minutes."

Q. Thereafter, did he come over to see you?

A. Yes, he came over to my house to see me.

Q. And did you discuss the matter of the subpoena?

A. Yes, I did.

Q. Will you give us the substance of the conversation with your brother-in-law.

A. Yes. I said, "What did I get this thing for?"

He said, "Don't worry about it. We all got them. We are all going down there tomorrow, and we are going to have a lawyer there, who will tell you what to do." He said, "We are not going to say anything there tomorrow and I would like for you not to say anything there tomorrow, and the lawyer we will have there will tell you how to go about it."

Mr. Rosenblum: I assume we have the same objection and the same exception to the entire line.

The Court: You do.

Q. Thereafter, did you go over to Brooklyn?

A. Yes, I did.

Q. Did you go in the company of anyone?

A. Yes, sir, Mr. Hoffman I believe picked me up in a taxi the following morning.

Q. Did you meet anyone in Brooklyn other than Mr. Hoffman?

A. Yes, with the cab we did not go directly to the grand jury room. Mr. Hoffman was supposed to meet Mr. Schopick, Mr. Davis and their attorney, Mr. Goldstein, in a cafeteria. That is where we went to.

Q. Did anything transpire in the cafeteria with Mr. [fol. 5] Hoffman in regard to the matter of the subpoena?

A. With Mr. Hoffman?

Q. Yes.

A. When we got to the cafeteria, and I don't remember who got there first or how it came, but Mr. Schopick

was there, Mr. Davis, and I think their attorney came in last, and all at about the same time, however.

Q. When he came in, they all got together and were hubbubbing as you call it?

A. No, sir.

Q. What is this hubbubbing?

A. I haven't got the slightest idea.

The Court: You mean they were engaged in conversation?

The Witness: No, your Honor, it was not conversation in the sense that it was open conversation. It was whispering, they were running to telephones, and that kind of thing.

Q. Thereafter, did you appear before the Brooklyn Grand Jury?

A. Yes, I did.

Mr. Ferguson: That is all.

Cross-examination.

By Mr. Corbin:

* * * * * * * * *

Q. Now, it is that conversation that I direct your attention to and nothing else yet: When you told it to him, the fact that you had gotten this subpoena, was that after the Schopick and Davis income tax indictment?

A. I think it was before.

Q. What did he say to you, Mr. Hoffman? Not what [fol. 6] you did; what did Mr. Hoffman say to you?

A. He said, "Well," he says, "don't say anything; do the same thing you did last time.".

* * * * * * * * *

Morton Marks, called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

Direct examination.

By Mr. MacMahon:

* * * * * * * * *

Q. After the meeting with Baradell did you have any further conversations with Davis or anyone else?

A. Yes. Mr. Davis then informed us several weeks later, a couple of weeks later that the Schwaeber & Saver fees were to be paid in cash, that they wanted this fee in cash rather than a check, and we wrangled for a while about the price that was demanded of us, and we settled it for about $16,000.

Q. Did you pay that $16,000?

A. Yes, I paid that $16,000 to Mr. Davis in our office.

Q. And in what form?

A. In cash.

Q. Now, how did you raise that money?

A. Well, this was several months after we had paid the $100,000, and we were accumulating money in the same fashion that we had to accumulate the $100,000, in order to pay back Mr. Jacobs that $25,000. So we had that money, therefore.

* * * * * * *

[fol. 7] Q. Did you have further doings with Schopick and Davis or Davis about this case from any time after August, 1949?

A. Well, Mr. Davis was busy settling our civil case with the Government at this time.

Q. Has that case ever been settled to this day?

A. Yes, that has been settled with the exception of the moneys that we didn't show on our books in the ensuing years.

Q. And that still is in dispute with the Government. Is that right?

A. Well, they have been going over our books for some time now about it. We haven't been given any decision from them as yet, but they have been working on it. They have our books at the moment.

Q. That is with relation to the moneys which you were taking off the top, so to speak, during this period from 1946 through 1949?

A. That is right.

Q. On travel and entertainment, unrecorded sales and so on. Is that right?

A. That is right.

* * * * * * *

Cross-examination.

By Mr. Singer:

Q. Mr. Marks, have you ever tried to figure out how much money you paid in fees in connection with this matter?

A. Yes, I did.

Q. Well, could we go along together on that and see if we could arrive at the complete figure? We started off, did we not, with the $7,500?

A. Yes.

Q. Paid back in June, 1947?

A. That is right.

Q. Now, do you know how much more in 1947?

A. I don't know the years.

[fol. 8] Q. Well, would you take my figures that apparently come from the indictment? Let us see if they refresh your recollection. December, 1947, $5,000; April 12, 1948, $12,500. Does that seem to refresh your memory?

A. That is right.

Q. That is $25,000 up to April 12, 1948?

A. Yes.

Q. Is that right?

A. That is right.

Q. That was paid by check of Pattullo Modes directly made to the order of Schopick & Davis?

A. That is correct.

Q. Now, I assume you have those returned vouchers, don't you?

A. I don't believe so. I think they are in the possession of the Government right now.

Mr. Singer: Well, may I have them? I want to put them in evidence.

The Court: Have you got them?

Mr. MacMahon: I would be happy to give them to you. We planned to put them in through the treasurer of the company who made the checks.

Mr. Singer: All right.

The Court: All right.

Q. Now we come to January 21, 1949, $12,500. That was about two weeks after you saw Mr. Clayton and made this statement. Do you remember that?

A. January 12th?

Q. January 21.

A. That is right.

Q. 1949.

A. That is right.

Q. $12,500. You paid $25,000? Before you say you gave Davis $100,000 you paid $25,000?

A. In 1947.

Q. By check in 1947, up to April, 1948?

A. That is right.

[fol. 9] Q. Then you say you gave Davis $100,000 cash?

A. That is right.

Q. Now, in January, a couple of months after you gave him this $100,000 in cash you started to give him a series of checks again, for $12,500, is that right?

A. That is right.

Q. We will come back later as to why, but just the fact of the payments. Then on March 15, 1949, $15,000?

A. Yes.

Q. Do you remember that?

A. Yes.

Q. And then five checks of $10,000 each on May 23rd, July 11th, October 10th, 1949, February 27, 1950, and May 31, 1950. Do you remember those?

A. Yes.

Q. Now then, on December 27, 1950, $5,000 again, is that correct?

A. That is right.

Q. And I added up, and I hope my addition is correct, and it comes to $107,500?

A. That is right.

Q. To Messrs. Davis and Schopick for law fees?

A. That is right.

Q. For law fees in the tax matter and law fees in the matter of Jo Copeland?

A. That is right.

Q. Now let us stop. That is one hundred and seven.

Now we will take and add to that another $100,000 in cash you say you gave.

A. Yes, that is right.

Q. That is $207,500, is that right?

A. That is right.

Q. Let us add to it the $16,000 you say you gave Davis.

A. Right.

Q. And we come to $223,500?

A. That is right.

Q. Now, the Government has in the indictment that the payment was $40,000. May we take that payment of $40,000 instead of your recollection of twenty-five to forty.

A. Well, if you take it knowing that I don't know whether it is exactly twenty-five or forty, it is all right with me.

[fol. 10] Q. Let us say we had $223,500. Now we will take forty added to that; now we have $263,500 you say you paid out, is tl t right?

A. That is right.

Q. With a variance of fifteen thousand one way or the other?

A. That is right.

Q. Now, wait; that wasn't all the fees yet?

A. No.

Q. Now, there was, and you haven't told us, a firm of Sher & Roder?

A. That is right.

Q. You paid them a fee of $40,000?

A. Well, that was paid by, I don't know the figures exactly, but that was individuals as well as the firm. I think it may be close to forty; more or less.

Q. Well, that puts it up to $303,500?

A. That is right.

. . . . . .

Q. Incidentally, going back to this talk about Davis telling you not to tell anybody about the money, didn't Davis tell you not to tell Mr. Saver anything about the money?

A. That is correct. Wait a minute now. Just let me——

Q. About the $100,000.

A. Well, just a minute now—Mr. Singer, I don't believe

Mr. Davis ever told me specifically not to mention it to Mr. Saver. He made it clear to us that it was being handled through another source, through the man in Washington or through Mr. Halperin, whichever way you want to put it, and that he would like Mr. Saver to believe he accomplished this and wanted him to think so. He certainly didn't have to tell us not to talk to Mr. Saver or to talk about it when he made it as clear as all that. I believe, before going down to Mr. Baradell's office, that he might have said something about that.

Q. Don't tell Saver about the $100,000?

A. Don't tell him about that, allow him to think that he [fol. 11] accomplished this; don't tell him about that money, that is right.

Q. Now, you are in Mr. Baradell's office, and it was then that you were told officially by Mr. Baradell the case would be closed on the basis of your cooperating with the Government. Is that right?

A. That is right.

Q. Do you remember Mr. Baradel saying to you in words or substance that you would have to pay the full tax?

A. Yes.

Q. And the penalty of 50 per cent, of the fraud penalty?

A. Yes, I don't remember whether he said 50 per cent, the full penalty.

Q. The fraud penalty?

A. That is right.

Q. And the interest on all of the money?

A. That is right.

Q. Now, all of the partners were there?

A. That is correct.

Q. Zipser, Segel, Cohen and you?

A. And Bellet.

Q. Do you remember Mr. Baradell saying anything in words or substance to the effect that you were not to do this anymore, this tax fraud?

A. I think I do. Yes, I think he did say something like that.

Q. And this was in January, 1949?

A. That is right.

Q. And Mr. Davis was there?

A. That is right.

Q. Didn't he tell you that this case being closed on this civil basis—the taxes plus penalties plus interest—was conditioned upon your behaving yourself and not continuing to cheat the Government?

A. He didn't put it that way. He told us not to do it anymore.

Q. Didn't he ask each one of you to promise that you wouldn't do it anymore?

A. He might have. I don't recall.

Q. As a matter of fact, you lied to him right then and [fol. 12] there, didn't you, because you had been doing it right up to the time for 1947 and 1948, and you were then doing it in 1949?

A. Well, except this; what we were doing in 1942 to 1946 was taking the money and putting it in our pocket. We were not using that money for personal at that time. We were paying it out in legal fees one way or the other.

Q. So you were cheating the Government for a different purpose now, to keep yourselves out of jail, as distinguished from putting it in your pocket to spend it?

A. I don't know how to answer that. I am not a lawyer. I am not a tax expert. But I think you have to pay taxes on what you keep of the money you earn. That money just went through us, so let us bear that in mind.

* * * * * * *

Q. Do you have any other way to keep yourself out of jail except by testifying, or do you know whether the statute of limitations has even run on these offenses from 1946——

A. I was not aware of that. As a matter of fact, I think we have signed waivers to that effect.

Q. Waivers as to your civil liability. You know that.

A. Yes, that is right, because this agreement was made right before the criminal prosecution went out.

Q. Just before, because the statute was still pending for 1946 in 1952. Isn't that right?

A. That is right.

Q. You missed it by about two months; March 15th, and you might have been all right. Isn't that right?

The Court: I don't know what you are talking about.

Mr. Singer: I will withdraw it.

[fol. 13] Mr. MacMahon: I think this is highly material to this case, that the time the witness testified over in Brooklyn, the statute of limitations was still open.

The Court: He still could have been prosecuted.

Mr. MacMahon: Yes, if it hadn't been for this deal.

Q. Didn't you think it was a pretty miserable thing to do to Mr. Saver, to have a lawyer, who represents you, not to know what you had been doing behind his back with Davis?

A. I think that question should be asked of Mr. Davis. He employed Mr. Saver.

The Court: I think the question is objectionable. What difference does it make what the witness thought, whether it was a bad deal——

Q. Did you think that was a proper thing to do? Was it one of the things that you were willing to do in order to keep from going to jail?

A. Mr. Davis was our attorney, and we did everything that Mr. Davis wanted us to do.

Q. Let us get up to 1951.

The Court: You have been up there twice before. How many times are we going to run around these calendars?

Q. Have I asked you anything about 1951 about a meeting in 1951, in cross-examination?

A. I don't recall. I think my testimony might show it.

Q. You remember you said sometime in the middle of 1951, Mrs. Segel and you came over to Mr. Davis's office?

A. Mrs. Segel.

[fol. 14] Q. Mrs. Segel and you.

A. Yes.

Q. You testified that Mr. Halperin and Mr. Davis and Mr. Hoffman were there and you two met. Is that right?

A. Mr. Davis——

Q. Mr. Halperin and Mr. Hoffman.

A. —were there with the two of us, Mrs. Segel and myself.

Q. Is that correct?

A. Yes, that is right.

Q. At that time, Mr. Halperin mentioned the fact that a committee in Washington was investigating tax settle-

ments, and you say that Mr. Halperin said that you were not to talk to anybody regarding this tax settlement? Was it Mr. Halperin who said it or Mr. Davis?

A. I think Mr. Davis said that. He said Mr. Halperin had learned that there was a committee in Washington investigating tax settlements. I thought I had said that yesterday. I might have been confused.

Q. I wanted it clear. All that Mr. Halperin said was that there was a committee in Washington investigating tax settlements.

A. Mr. Davis said there was a committee—Mr. Davis said that Mr. Halperin had learned it.

Q. Mr. Halperin said nothing.

A. Practically nothing.

* * * * * * *

Q. Do you recall whether or not the first time you testified in this courtroom you made the statement that you brought $25,000 to $40,000, paid it to Davis for the boys in New York upon his statement that the boys in New York had been helpful about this matter?

A. And he didn't want to upset the applecart. I think that was my testimony.

Q. You think that is your testimony?

A. Yes, sir.

[fol. 15] Q. Did he tell you how they were going to upset the applecart?

A. Did he tell us how?

Q. Yes.

A. Well, I just got through saying a few minutes ago that after the Baradell conference, we still were not at ease about the thing. We knew that we were elated over the results, but we still were worried about it. There was cooperation to take care of. We had to make this payoff for the New York boys. We were not through with it at that time. We never knew when something else was going to come up. We weren't through at all. They were working out the Copeland matter. For two years after that we still weren't through with the thing.

* * * * * * *

Q. Now, I have one thing and I think I am finished. By the way, is this practice you told us about, cheating in order to get the money to pay Mr. Davis—does that still continue?

A. No, sir.

Q. When did it stop?

A. It stopped when we got through with paying of the——

Q. When did it stop?

A. When we got through with the paying of the Jacobs money.

Q. When was that?

A. I would say that was right before the Brooklyn Grand Jury, probably January of 1952, it probably stopped.

Q. January 1952 it probably stopped?

A. Yes.

Q. Are you sure of that?

A. Well, I know it was right before the Brooklyn Grand Jury. So you can——

Q. Before the time you appeared before the Brooklyn Grand Jury was the time that that practice stopped, is that right?

A. That is right.

* * * * * * *

[fol. 16] MAURICE SMITH, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. O'Hara:

* * * * * * *

Q. What did Revenue Agent Scherm do then?

A. He left. I told him I would check it up further and let him know exactly what the status was.

Q. Following the time he left did you have any conversation with any of the principles of Pattullo Modes?

A. I surely did.

Q. With whom did you have a conversation?

A. I had a conversation with Mr. Morton Marks. I think with Mr. Segel. And I told Morton Marks——

Q. Where?

A. 498 Seventh Avenue.

Q. Right there?

A. Yes.

Q. In words or substance what was that conversation?

A. Well, the ultimate thing was, I told him to jump.

Q. What?

A. I told him to jump from the 14th floor.

Q. Did you ask Mr. Marks about these sales Revenue Agent Scherm had been inquiring about?

A. Yes.

Q. What did he tell you?

A. He told me that they had deposited the money in their own bank account, they had cashed it; they were not on the books.

Q. What did you do next?

A. I went with Morton Marks to this department store in Brooklyn to try to get some of the figures.

Q. What was the name of that department store?

A. Loehmann's Department Store. At the same time I tried to get in touch with Revenue Agent Scherm and Max Steinberg. I made a few calls to Max Steinberg, I wasn't able to get him. I went up to the office at 341 [fol. 17] Ninth Avenue and I saw Harry Scherm and I asked him if I could get in to see Max Steinberg. He came out and said I couldn't see him. I left.

Q. Now, approximately what date would you say that was as best you can fix the time?

A. Some time in May, 1947.

* * * * * * * *

Q. I believe you started to answer by saying that you had to take it back a ways before you could tell about the conference. Have you done that now?

A. Yes. We went down to the office of Schwaeber & Saver, and the method of writing up the affidavit was discussed, and during one of the conferences they had asked me about dates as to when I saw Revenue Agent Scherm

and when this 917 came along, I didn't have any records whatsoever. Mr. Davis told Milton Hoffman to get the dates. He said he would and he supplied them.

Q. Mr. Hoffman got the dates and supplied them?

A. Yes, sir. I know that a few copies were made of this affidavit.

Q. You had no dates of the visits of Revenue Agent Scherm either on the audit or the second time with the 870. Is that what you said?

A. None. Neither did I have the date of the 917 when he brought it up.

Q. Did Mr. Hoffman subsequently tell you the dates?

A. He supplied them to Mr. Davis. They were typed in, and I read about them.

Q. Was the affidavit prepared at this conference that you are talking about, or are there two conferences?

A. There were a few copies prepared, Mr. O'Hara. I signed one in the latter part of October 1948.

[fol. 18] Q. Was that at the conference that you have just been relating, where the question of dates came up?

A. No, the question of dates was before that because they had to prepare the affidavit.

Q. Then there was another conference. Am I right?

A. Yes, sir, there was one in which I signed it.

Q. Who was present at that conference, as best you can recall?

A. I think Mr. Saver. Mr. Davis was. I think Mr. Hoffman was, and most likely the person who notarized my signature came in later. I don't know.

* * * * * * * * *

Q. Did anyone communicate to you the results of this meeting with Mr. Baradell on this occasion?

A. Yes, Mr. Davis.

Q. What did he tell you?

A. He told me that my affidavit had been turned down, and that there was going to be an examination by the Intelligence Department, and that I was to cooperate with them and with the firm of Weisberg & Greenstein in any matters when the revenue agents came up.

Q. Did the revenue agents come up there?

A. Yes, sir.

Q. Were you present on the first occasion when they came there?

A. Yes, I was present, Mr. Weisberg and Mr. Davis. Mr. Scherm came and Mr. Clayton came.

Q. What transpired at that time?

A. Mr. Davis introduced me to Mr. Clayton. He introduced Mr. Weisberg, and he made particular mention of the fact that we were to give one hundred per cent cooperation to the Internal Revenue, and to give them all the information that they wanted, to cooperate at all times.

[fol. 19] Q. What is your best recollection as to the date that that occurred?

A. In 1949.

Q. Approximately when?

A. I think it was the beginning of 1949, but it lasted for a long time they were there.

Q. Your best recollection is in the year 1949?

A. Yes, I think they started in 1949.

Q. You signed an affidavit in October 1948. Is that right?

A. Yes.

Q. You had two conferences with Mr. Baradell. Is that right?

A. Right.

Q. When in your own mind do you place this event with respect to the last conference you had with Mr. Baradell?

A. I think either very late in 1948 or the beginning of 1949 or the early part of 1949. The revenue agents came in after that.

Q. You previously mentioned that you met Mr. Deutsch?

A. Yes, I did.

Q. Do you have a recollection of any further event connected with Mr. Deutsch other than what you have already testified about?

A. Yes, I did.

Q. Can you tell me when that was and what the event was?

A. In January of 1949, the latter part of January of 1949, we received a check from the firm of Schopick & Davis for $2500. I think I perhaps was up there to get it. Mr. Milton Hoffman asked me if I would make out

a check to his brother-in-law, Mr. Deutsch, in the amount of $500, since he was the man that had brought me from Mr. Katz's office to Schopick & Davis.

Q. What did you say to that?

A. I gave him a check. I had a check made out for $500.

Q. What did you say to Mr. Hoffman? Mr. Hoffman [fol. 20] made a request to you. I want to know what you said to Mr. Hoffman.

A. I think the only comment I made was perhaps a sort of crack that this was an expensive trip.

Q. I show you Government's Exhibit 4 for identification and ask you if you can tell me what that is (handing).

A. It is a check of our firm, Stratford Audit Company, dated January 25, 1949——

Q. I want you to tell me what it is.

A. It is a check made to Herman Deutsch in the sum of $500.

Q. Is that the $500 you have just been testifying about?

A. Yes.

Q. Is that the check which was given at Mr. Hoffman's request by your firm to Mr. Deutsch?

A. Yes, sir.

. . . . . .

Cross-examination.

By Mr. Rosenblum:

Q. After the occasion of your meeting in Mr. Baradell's office, what was the next occasion that you had to tell the truth?

A. To tell the what?

Q. To tell the facts and tell the truth concerning this case.

A. To tell the facts and the truth?

Q. Yes.

A. Was after I was indicted, after the King Committee.

Q. Did you testify before the King Committee after the Baradell incident, when they were told there would be no criminal prosecution?

A. Yes.

Q. Then did you commit perjury again?

A. Before the King Committee, I did.

Q. After everything had been straightened out, that [fol. 21] there would be no prosecution, and then you committed perjury again?

A. I told the same story as per the affidavit.

* * * * * * *

MARJORIE SEGEL, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. O'Hara:

* * * * * * *

Q. Now, following June 9 did you have occasion to confer with persons in the firm of Schopick & Davis?

A. Yes, sir.

Q. And whom were your conferences with?

A. With Mr. Hoffman and Mr. Davis, usually together; sometimes separately.

Q. Was Mr. Schopick present on any of these occasions?

A. Very rarely. I mean, I used to see Mr. Schopick in the office, but he rarely participated in the conversations.

* * * * * * *

Q. Had you occasion to meet Mr. Halperin prior to this conversation you are just relating?

A. I had seen him or casually been introduced to him on visits to the office.

Q. As best you can will you fix the approximate date of this conversation that you have just related.

A. I would think in the summer.

[fol. 22] Q. Of?

A. Of 1948.

Q. After this conversation were there any other conversations with Davis and/or Hoffman relative to Mr. Halperin?

A. Yes. That Mr. Halperin had been down to Washington and had spoken to this man and that the man could do it.

Q. Was anything said to you in words or description about this man?

A. No, sir, except that he was very important; I might add that.

Q. Following that that they said to you that this man in Washington had been seen and would accept this matter what happened next?

Mr. Corbin: Just a moment. I doubt if that is quite an accurate recital of what the lady said.

(Last several questions and answers read.)

Q. What happened next?

A. The next thing was that we were told by Mr. Davis or Mr. Hoffman or both that the man would do it but was asking a lot of money.

Q. Was any amount of money mentioned?

A. To the best of my recollection the amount that was first asked was $150,000.

Q. What if anything did you say to either Mr. Davis or Mr. Hoffman with respect to the amount?

A. I said that desperate as we were it was just physically impossible to acquire that—oh, they said that that amount of money had to be in cash, and we said it was impossible to get together that amount of money in cash.

Q. You had assets of your own at this time, did you not?

A. Yes.

Q. And the other principals of Pattullo Modes had assets, did they not?

A. Yes.

Q. Do I understand you told them that you couldn't [fol. 23] raise that amount of money?

A. Yes. Because they told us that we couldn't use any assets for the cash, not to sell anything that there would be a record of, or anything of that kind, cash any large checks; that it would have to be cash that there was just no record of, and that is why we said that it was impossible for us to have that much money.

Q. Following this conversation were there any other conversations about money with Mr. Davis or Mr. Hoffman?

A. Yes. They said that they would see what they could

do, or that Mr. Halperin would see what he could do; that actually the man really wanted more than that to start with.

Well, the next conversation was after we were told that Mr. Halperin had spoken to the man; and I don't remember whether at this point we told him how much money we were able to get or whether they told us the amount that was decided on, but it was $100,000.

Q. Now, at the time of these conversations do you know if there was cash in the safe deposit box about which you testified previously?

A. Yes, sir.

Q. Do you know approximately how much cash was in there?

A. Yes. There was approximately $70,000 in cash.

Q. Do I understand that you finally agreed upon an amount?

A. Yes, sir.

Q. What was the amount?

A. $100,000.

Q. Will you tell us what if anything was done about raising $100,000?

A. Well, we had about $70,000 or a little bit more and we gathered together another couple of thousand dollars to make seventy-five, and then we borrowed, or rather Mr. Marks and Mr. Cohen did the actual borrowing of $25,000 in cash from a friend for which they gave bond as security [fol. 24] but said to be sure not to sell them.

Q. Do you know what happened to that $100,000 after it was raised?

A. Yes.

Q. How do you know?

A. Well, I was in the office when Mr. Marks left with it.

Q. Was he alone?

A. No.

Q. Who was with him?

A. He was with my brother.

Q. Do you know by what arrangement your brother was there?

A. Yes. He asked him to go along with him; because of the large amount of money he wanted another man.

Q. Incidentally, what office did your brother hold in Pattullo Modes?

A. President.

Q. Was he customarily on the premises and active in the business?

A. No, he was not. He was inactive, I would say, except just for certain occasions.

Q. Did he have any other business?

A. Yes.

Q. And I believe you said you knew what happened; you were there when they left with the money.

A. Yes.

Q. Did anyone tell you what was done with the money?

A. I was told that the money was taken over to Davis & Hoffman's office and given to them.

Q. Now, what is your best recollection as to the time that this event happened?

A. The time of the year, you mean?

Q. The date.

A. I would say in the fall, October, possibly, towards—in the fall is all I really—I mean, that is all—I know it wasn't in the summer because the summer is when we started talking about all this and it must have been in the fall.

* * * * * * *

[fol. 25] Q. Do you know how much the entire amount came to?

A. I think it was about $100,000.

Q. I believe you stated previously that Saver & Schwaeber had been retained on your behalf?

A. Yes, sir.

Q. Did you pay any fees to them at the time they were retained?

A. No, we did not.

Q. Do you know if anyone else did?

A. Davis said that they would pay the retainer of $3500 themselves.

Q. Did Pattullo Modes ever pay any fees of Saver & Schwaeber?

A. We paid fees to Davis for Saver & Schwaeber.

Q. Approximately when was that?

A. Early in 1949. Possibly February

Q. And would you please tell us the circumstances of that? Who asked for them?

A. Mr. Davis asked—came to our office and told Mr. Marks and me that Saver & Schwaeber were asking for a fee that they wanted in cash. Davis said that he hated to ask us for it on top of everything else, but unfortunately Saver & Schwaeber thought that this result had been accomplished by then, so they were entitled to some more money, and we said we would rather pay it from the firm if we had to pay it at all, and they said that they insisted that it should be in cash.

Q. What was done about that? Anything at this conference?

A. Well, Davis insisted, they insisted that it had to be paid, and he said he would go back and see if they would take less.

Q. Did you have a further conference about the matter?

A. Yes. And then——

Q. Excuse me a minute. How long after, please, to [fol. 26] the best of your recollection?

A. A short time. I couldn't say how long.

Q. What was that conversation?

A. That was that they would compromise and take less than the amount they originally asked.

Q. Who said it?

A. Mr. Davis.

Q. Mr. Davis said it to you?

A. Yes.

Q. The "they" you refer to is who?

A. Saver & Schwaeber.

Q. Was there a final amount agreed upon?

A. Yes, there was.

Q. How much was that?

A. Around $15,000, to the best of my recollection. I can't be sure of the sum.

Q. Can you tell us the exact amount?

A. No, I cannot.

Q. Do you know what if anything was done after the amount was agreed upon?

A. Yes. The money was paid to Davis.

Q. Now, Mrs. Segel, how do you know that?

A. Well, I know that the money was in our office in a bag, an envelope, and Mr. Davis came up to our office and Mr. Marks gave it to him.

Q. Were you present when that occurred?

A. Not at the actual giving, no.

Q. Did Mr. Marks tell you about it?

A. Yes.

Q. Again I would like to have you tell us approximately what date this would be, this last occurrence you just related.

A. I can't give you the date. I would say about some time in February, I believe.

Q. Now, at this time do you know what was happening with respect to the tax case?

A. Well, of course, we got the word of no prosecution, and the agents, as far as I remember, were still working in our office on the settlement of the tax liability.

[fol. 27] Q. And was that matter finally adjusted, do you know, speaking now of the tax liability?

A. I thought if had been, yes.

Q. Now, in connection with the tax liability, did you have occasion to deal with any other than different lawyers than you have mentioned up to now?

A. Yes, sir.

Q. And who were they?

A. Scher & Roder.

Q. Will you please tell us the circumstances of their retention in this matter?

A. Well, it was in the course of coming to the final figure on our tax liability, and again, Davis suggested that he bring in this firm of lawyers who supposedly were experts on that subject, and we said yes, as we did to everything.

Q. Do you know how they were compensated?

A. They were compensated by us individually and also by the firm of Pattullo Modes.

Q. Do you know the approximate total amount of their compensation?

A. As I remember it, all together it was about $40,000.

Q. Now, following the visit of this other gentleman, did you have any further conference with Mr. Davis with respect to Mr. Shapiro?

A. Well, not specifically in respect to Mr. Shapiro.

Q. What did you have a conference with respect to then?

A. About what was going to happen, whether the Committee actually was going to do anything about it.

Q. Do you know when that conversation took place?

A. The very next day. I think it was a Thursday that this happened, this visit. I was alone at the office. Mr. [fol. 28] Marks was out of town. Mr. Cohen was in Europe. The next day, when Mr. Marks came back, we discussed it.

Q. You discussed it with Mr. Marks?

A. Yes.

Q. Did you discuss it with Mr. Davis and Mr. Marks?

A. Yes.

Q. On that occasion, what was the substance of that conversation?

A. The substance of it was that we should just be sure not to say anything and just sit tight and wait until we see what happens; but then another person from the Committee called on my brother and it looked as if things were really being pointed at us, and on the following Monday, when Mr. Cohen came back from Europe, he said that he didn't think he, Mr. Davis, could represent us because either he had been subpoenaed at that time or had heard that he was going to be. I can't remember. Therefore, he couldn't represent us and suggested that we have Mr. Saver represent us.

Q. What was done about this suggestion, if anything?

A. We went over to Mr. Saver's office and Mr. Saver said that he didn't think he could represent us, because his partner was a member of Congress, and he suggested another attorney, Mr. Kostelanetz.

Q. What, if anything was done about that suggestion?

A. We then went down to Mr. Kostelanetz' office.

Q. Did you retain Mr. Kostelanetz?

A. Yes, sir.

Q. Now, Mrs. Segel, was there any time that Pattullo Modes made any cash payments in connection with the fraud tax case other than those you have related?

A. Yes, sir.

[fol. 29] Q. Can you tell us approximately when that was?

A. It was sometime in 1949. I can't place the date. I would think towards the latter part.

Q. Can you tell us the event?

A. The event of actually paying it, you mean?

Q. No. I am asking you, can you place the fact of the occurrence?

A. Yes.

Q. Will you please tell us how that came about?

A. Well, we had already paid $100,000 for this no prosecution. We got the word of it, but, of course, we never felt too sure about anything because the civil settlement still had to be made and we knew there were people that had to go through it and pass on it and everything, and while this was going on we were told that we would have to get up some more money.

Q. Excuse me. We were told? Please say who "we" might be and who it was that told you.

A. Well, the first I heard of it I think was from Mr. Marks.

Q. Did you have occasion to discuss it with Mr. Davis?

A. Yes. I discussed it with him at some point after that.

Q. Will you please tell us the nature of the discussion with respect to this matter?

A. Well, the substance of it was that people in New York had not been taken care of and that in order not to upset the applecart this had to be done too.

Q. What was done about it, if you know?

A. The money was paid.

Q. And how much?

A. About $40,000.

Q. Do you recall the amount?

A. I don't recall the exact amount but it was in that neighborhood.

By the Court:

Q. How do you know? Were you there?

A. Oh, you mean whether that actual amount——

[fol. 30] Q. Did you see the money paid over?

A. No, your Honor, I didn't.

Q. You were not there?

A. No.

Q. How do you know it was paid over?

A. Because Mr. Marks——

Q. You are relying purely on what Mr. Marks told you?

A. In this case, yes.

The Court: We'll strike it out. Mr. Marks has already testified. I am not going to take hearsay of what Mr. Marks told this lady.

By Mr. O'Hara:

Q. Mrs. Segel, at this time were there being off-the record sales made by Pattullo Modes?

A. Yes.

Q. What was being done with the proceeds?

A. The proceeds were—at what particular time?

Q. We are speaking now of 1949. We are speaking of this incident which you just related.

A. The proceeds originally, I mean, the money that was put in the box originally was supposed to be used to pay back the loan; that had to be paid back in cash; but then the occasion came when we had to pay the money out for Saver & Schwaeber, and then it was told to us that we had this other payment that had to be made. So we had to keep saving money for that purpose.

Q. Do you know the source of the money that you had saved which was paid in addition?

A. Do I know what?

Q. The source of it. I mean the money you just testified was certain cash: do you know where that money came from?

A. Out of the safety deposit box.

[fol. 31] By the Court:

Q. Did you see it come out of the safety deposit box?

A. Not actually come out of it, no.

Q. Did you ever see the money, the $40,000?
A. I saw it.
Q. In a bundle?
A. Yes.
Q. Where?
A. In my office.
Q. In your office?
A. Yes.
Q. With whom?
A. With Mr. Marks.
Q. With Mr. Marks? Did you see what Mr. Marks did with it?
A. I saw him leave with it.
Q. You saw him leave with it?
A. To take it over.
Q. All right. Did you count the money?
A. No, sir.
Q. Did you see anybody count it?
A. No, I didn't.
Q. You don't know how much money was in there?
A. Well, Mr. Marks counted it.
Q. Mr. Marks told you?
A. Yes.
Q. Did he count it in your presence?
A. No, sir.

By Mr. O'Hara:

Q. Mrs. Segel, you stated previously, "all these things we have done wrong": what were you referring to?

Mr. Aranow: I object to that.

The Court: Well, I think you had better get the connotation of what you mean by that, Mr. O'Hara.

Q. Mrs. Segel, in 1949 you were still making off-the-record sales, is that right?
A. Yes, sir.
Q. For how long did that continue?
A. After 1949?
Q. Yes.
A. It continued in a minor way until we finally paid back the loan that was made in 1948.

Mr. Rosenblum: Can we get the time, if your Honor please? A minor way until when?

[fol. 32] The Court: She said until they paid back the loan.

Mr. Rosenblum: When?

The Court: All right. When did that happen?

The Witness: I believe that was in 1951.

Q. And in 1951 was Pattullo Modes being anything to Jo Copeland out of the proceeds of these off-the-record sales?

A. No, sir.

Q. Were tax returns being filed during the years 1949, 1950 and for the year 1951?

A. Yes, sir.

Q. At the time you were subpoenaed in Brooklyn were you informed that you might be indicted?

A. Yes, sir.

Q. And do you know what it was you might be indicted for?

A. Yes.

Q. What was that?

A. For income tax evasion.

Q. Do you know for what years?

A. Well, it was for the year that the statute of limitations was going to run out that March.

Q. Well, do you know whether or not it was for any of the years 1942 to 1946, inclusive?

A. I think it was 1946. That was the year in question.

Mr. O'Hara: That is all, your Honor.

* * * * * * * *

Cross-examination.

By Mr. Corbin:

* * * * * * * *

Q. Returning to the summer of 1949, that was the summer after you had learned in January that the criminal [fol. 33] prosecution was out the window, so to speak, right?

A. Yes.

Q. Were you relieved and somewhat happy about that?

A. Well, yes, we were relieved. We didn't think it was all behind us, but we were relieved up to a certain point.

Q. You were relieved? You say yes?

A. Yes.

Q. You told us about your great anxiety and worry before that time, and that was quite different after that, when you got this word that there would be no criminal prosecution, right?

A. Yes, we got the word.

Q. Isn't it true that thereafter during the summer of 1949, the winter of 1949 to 1950, the summer of 1950, down through to the summer of 1951, you and your partners or associates in the company were all taking normal vacations, enjoying a normal business life? Is that a fair description?

A. We were taking vacations, yes.

Q. Do you live up in Scarsdale?

A. Yes.

Q. Are you a member of any country clubs up there?

A. A beach club.

Q. Where?

A. In Mamaroneck.

Q. Do you play golf?

A. No, sir. I mean I have played.

Q. Now, the time came, as I understand you, in the early summer of 1951 when something was said about a congressional investigation in the offing?

A. Yes, sir.

Q. There was a good deal in the newspapers about it at the time, was there not?

A. I think we were told before anything appeared in the newspapers. I am not positive of that, but it seemed to me that we heard it first.

Q. Then were you told in June of 1951, that is, before July, 1951, that there was a possibility of an investigation?

A. I am not sure of the date I was first told. I think it [fol. 34] was a month or so before Mr. Shapiro came. It could have been six weeks. I don't know. It was in the summer.

Q. And you say it was Mr. Davis who told you about that?

A. Yes.

Q. And that was nearly, well, two and a half to three years after you say the $100,000 was accumulated, right?

A. Yes.

Q. You fix that time as in the late fall of 1948?

A. Yes, sir.

Q. Now, between the time that you think Mr. Marks delivered $100,000 cash to Davis and Hoffman, and I use the words "you think" because you were not there——

A. Well, it is more than "think." I mean I saw the money and I saw him and my brother carry it out. So I think I could be pretty safe in thinking it was delivered.

Q. Well, I am not criticising you at all for your thought. I say from the time you assume or think that the $100,000 cash was delivered to Davis, several months expired before Davis got you to sign that agreement regarding his services?

A. Yes.

Q. Now going along on the same assumption, namely, that $100,000 cash was delivered to Davis, it was several months after they got their hands on that money that they asked you for a paper writing which would state that they then had $50,000 more coming to them for past services than had already been paid to them up to that time?

A. Past and future.

Q. What is that?

A. Past and future, I would think.

Q. Maybe I didn't understand the paper, but don't you recall, and if I am in error you correct me, that the $50,000 that was to be paid under that paper in instalments in the future was to cover services rendered up to that time, [fol. 35] that is, up to the time of the paper?

A. Is that stated in the paper?

Q. The date of the paper——

A. I say, was that stated that way in the paper?

Q. Well, I got that impression from a quick glance at it. You know it better than I do.

The Court: Show Mr. Corbin the exhibit.

(Mr. O'Hara hands to Mr. Corbin.)

Q. Referring to Exhibit 16, it reads, in consideration—it is directed to Schopick & Davis, Judge and ladies and gentlemen.

The Court: Yes.

Q. (Continuing) —and it is dated July 11, 1949. It says, gentlemen, In consideration of your willingness as indicated by your signature and approval of the terms hereof at the foot of this letter to defer the payments of the indebtedness now due and owing to you by Pattullo Modes, Inc. known as Pattullo-Jo Copeland, Inc. for professional services rendered amounting to the sum of $50,000 and to accept payment thereof as follows, 10,000, 10,000, 10,000 and so forth, the undersigned hereby jointly and severally guarantee the full and prompt payment of each of the foregoing instalments.

A. Well, it says—

Q. Pardon me, so we can clear it quickly, perhaps. That is obviously a reflection of an understanding, that the $50,000 still to be paid had already been earned up to that time, and it was then at the time of the paper due and owing by you to Schopick & Davis, is that right?

A. Well, it does sound that way.

[fol. 36] Q. Yes.

A. Our understanding certainly was that it would cover anything further that was to be done. The civil liability was still pending, and anything else that had to be taken care of. The $100,000 was to include everything. I mean that was our understanding at that time. Maybe we should have read that more carefully.

Q. Did you or did you not sign one of these papers of which Exhibit 16 is a carbon?

A. Yes, I did.

Q. And did you read it before you signed it?

A. Yes.

Q. You understood it, didn't you?

A. Yes. I must have read it.

Q. Are you quite sure today when you say that this wasn't the understanding, that the real understanding was something different from what is stated here?

Mr. O'Hara: I object, your Honor.

Q. Are you quite sure you are accurate in your recollection?

The Court: I will allow it.

Q. Are you quite sure you are accurate in your recollection?

A. My recollection is that the sum of $100,000 would include everything that was to be paid to them, and as a matter of fact, I even—that even was to include their handling of a State matter that hadn't even come up yet, and I think never even got paid for; I mean the $5,000 of that amount was still open. So it obviously included everything that they ever were going to do for us.

Q. Well, what estate matter was that?

A. Well, whenever they had to do anything about our State tax.

[fol. 37] The Court: I think the witness said State rather than estate.

Mr. Corbin: Oh, State.

Q. I was thinking about your father's estate. State tax? Well, did you ever have any other writing with Sehopick & Davis as to what your arrangement was with them regarding fees?

A. Not to my knowledge, no.

Q. This was the only writing?

A. That is the only one I recollect.

Q. And you say now that an even $100,000 was the overall figure that they were to get for their services?

A. Yes, sir.

Q. Well, you paid them more than that, didn't you?

A. I thought that is what we had paid them. I haven't gone over the checks.

Q. Didn't the checks——

A. That may have been a hundred excluding the retainer fee.

Q. Well, was it that? Was that the agreement?

A. As I say, I am not quite sure of how much we actually did pay for that. My memory is that it is around $100,000 that they asked for. If we had paid them more, then it could have been that in addition to the retainer fee.

Cross-examination.

By Mr. Singer:

* * * * * * *

Q. But you had gotten a promise of immunity before that, back in 1949, in Mr. Baradell's office, when you were told that there would be no criminal prosecution for your crimes on the income tax up to this time. Isn't that right? [fol. 38] A. I don't know whether that it called immunity or not. We were told that by Mr. Baradell.

Q. When Mr. Baradell told you that you would not be prosecuted, you remember that, don't you?

A. Yes.

Q. You can't tell me the exact day, can you?

A. Beginning of January.

Q. In January of 1949. Do you remember Mr. Baradell saying, "You are not to do this any more and you are to tell the complete truth about it," about all that you had hidden which had not been reported to the Government? Do you remember that?

A. Yes.

Q. And you agreed to do it, didn't you?

A. Yes.

Q. You broke that deal, didn't you?

A. Yes.

Q. You broke it right away the very same day that you made it, didn't you?

A. Yes.

Q. And right while you were making the deal, you were lying to the very man who was extending the deal to you, Mr. Baradell. Isn't that right?

A. Yes.

Q. You say, however, when you made a deal in 1952, that deal you have kept?

A. That isn't the same kind of deal.

Q. I see. In the first instance you were talking to Mr. Baradell directly, weren't you, you and he directly?

A. Yes.

Q. So that you could see the man and he could see you?

A. Yes.

Q. And you knew when you looked at him that you were lying right to his very face to Mr. Baradell? You knew it, didn't you?

A. Yes.

Q. The second deal you never saw the people with whom you made the deal, did you? Your lawyers arranged it in Washington and reported it to you?

A. Yes.

[fol. 39] Q. Before you came to see Mr. Baradell, you remember, don't you, that early in November 1948, the revenue agents came into your place and how they started to go into these hidden funds? Do you remember that?

A. Yes.

Q. At that time, you had an opportunity, did you not from November or at least two weeks and for four weeks in December and for two weeks in January—eight weeks—while the agents were working in your place, and you were supposed to be telling them the truth, you had eight weeks' time within which to make up your mind as to what you were going to do about telling the truth; is that right or isn't it?

A. Obviously, when we pay a bribe of $100,000 for something, we know that is untruthful——

Q. Do you say you paid Mr. Baradell a bribe of $100,000?

A. No, I don't say that at all.

Q. What then has the bribe got to do with Mr. Baradell? As far as you knew then——

Mr. O'Hara: May we have an answer to the previous question first?

Mr. Singer: That is my question.

Q. So far as you knew then, what did the bribe have to do with Mr. Baradell?

A. Nothing.

Q. Was there anything in this bribe you say you paid that would permit you to lie to Mr. Baradell?

The Court: I don't know what that question can mean.

A. A bribe is a lie in itself.

Q. Well, let us understand it. You say you paid a bribe to somebody. Is that right?

A. Yes.

[fol. 40] Q. The man you paid the money to was Davis?

A. That is correct.

Q. As a matter of fact, you didn't pay it. It was partly your money?

A. Yes.

Q. Davis said that it was going to some man whose name wasn't mentioned?

A. That is correct.

Q. It was going to somebody, who was going to try to get this thing straightened out the way you wanted it. Is that right?

A. Yes, sir.

Q. But even at that, didn't Mr. Davis say to you that that was conditioned upon your telling the truth to the Internal Revenue Department?

A. Well, you don't think that Mr. Davis wanted us to tell about the $100,000?

Q. Whether he said anything about the $100,000 or not, he wanted you to tell the truth about what money you had taken out of the business and hidden?

A. We couldn't have told the truth without telling that.

* * * * * * *

Q. His Honor just made a long statement in which he said, and you also said it too, that it was obvious that Mr. Davis didn't want you to tell them about the bribe?

A. It was not only obvious, but he had told us many times. At the time of the bribe, we were told in no uncertain terms that no one should be told about it. That would obviously include a revenue agent.

Q. Of course. But now, what did that have to do with the fact that you were to tell the Revenue Department the truth about your income? To whom you paid it made no difference, but the truth about your income.

The Court: Let the witness answer.

A. If we had told the truth about taking out all this money and they said, "Well, where is it?", what would we say?

[fol. 41] Q. Supposing you kept it. You had lied about many other things.

A. Well, we admitted to having kept all that we had kept. Why should we admit to something we hadn't kept?

* * * * * * *

Q. I think you said that you continued to hide this money in 1952, am I correct?

A. No, sir.

Q. It stopped in 1951?

A. When we paid back the loan, yes.

Q. And would you say that it stopped before August of 1921?

A. Before what?

Q. August of 1951.

A. It stopped as I said when the loan was paid. I really am not sure whether it was before or after August.

* * * * * * *

Q. Incidentally, was Schopick ever present when you had any of these talks with Davis and Hoffman?

A. Are you still talking about the money?

Q. Yes, before you saw this bundle of money in your office?

A. I don't recall Schopick being in on any of it.

* * * * * * *

[fol. 42] Louis M. Berman, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

* * * * * * *

Cross-examination.

By Mr. Corbin:

* * * * * * *

Q. When that end came and your relations were closed with Schopick & Davis, you received a bill that you have referred to——

Mr. Heffron: Your Honor, there is a misstatement of fact there——

The Court: Finish the question, Mr. Corbin.

Don't interrupt in the middle of a question. Just stand up, Mr. Heffron, and I will rule upon it when the question is finished.

The stenographer will read the question as far as it has gone.

(Question read.)

Q. Is that right?

Mr. Heffron: Your Honor, I object——

Mr. Corbin: Now, your Honor——

The Court: Have you finished your question?

Mr. Corbin: Yes.

The Court: Then counsel has a right to make objection to it.

Mr. Heffron: I object to the question on the ground it contains a misstatement of fact in that the witness has testified he did not terminate his relations with Schopick & Davis——

[fol. 43] Mr. Corbin: That is just what I expected. It wasn't an objection. It was a statement for the benefit of the witness to put him on guard so that he might answer——

Mr. Heffron: Your Honor, I object——

Mr. Corbin: I think it is highly improper for an attorney to make an objection and put in that kind of a tip to the witness.

The Court: Mr. Corbin, you have heard the witness testify that his relations had gone on for some time.

Now, the witness can answer that question.

Mr. Corbin: He can now.

The Court: Mr. Corbin, in a trial of a case of this nature, I think we as lawyers and jurors and judges are looking to get the facts. We are not trying to trick people I hope. I mean, I think we are all looking to get the facts.

Mr. Corbin: I hope so.

The Court: All right. Let us proceed on that basis. I think that is the duty of the Bar and the Court and everybody.

Mr. Corbin: That is just the point I am making.

The Court: The stenographer will read the question again.

(Question read.)

A. I received the bill, but my relations with Schopick & Davis were not ended.

Q. If I am wrong, you tell me, but didn't you say within the last five minutes that your deal with Schopick & Davis was to get the criminal prosecution stopped and that when it was stopped, you were to pay them and if it were not stopped, you were to pay them nothing?

[fol. 44] A. That is correct, but you didn't ask me whether my relationship ended, and I say to you now that at the outset, there was talk about my civil matter, which had to be attended to, and they were to handle it thereafter. There isn't any question in my mind about that. If I phrased my answer incorrectly, that is the way it was.

Q. That is something you have been talking about with the young men in the district attorney's office, isn't it?

A. Mr. Corbin, I didn't have to talk about that there. I know that as a fact.

Q. Then why, when I asked you, didn't you tell me what the deal was?

Mr. Heffron: I think counsel is arguing with the witness.

The Court: That is an argumentative question. Ask a question that will get some facts. I don't understand, Mr. Corbin, that he didn't tell you what the deal was.

Ask a question.

* * * * * * *

Q. Well now, will you tell his Honor and the jury what your conversation was with Davis on that sixth occasion when you talked with him.

A. All I said to Davis on that occasion was that I was going to agree to the terms as he outlined at the meeting that we had just left.

Q. You said you were going to agree?

A. That is right.

Q. Didn't you say that you did agree?

A. Well, I mean that I would agree or going to agree. I felt that I am saying that I did agree.

Q. Well, I wanted to get this clearly. Did you say to [fol. 45] him in words or in substance that you agreed with his terms for a payment, that is an amount for the services of him or his firm or both?

A. That is correct.

Q. It wasn't something that you said you would agree to later?

A. No. At that telephone conversation I agreed to the terms.

Q. Now, what were those terms?

A. Those terms were the payment of $60,000 in cash; $5,000 would be in the form of a check when I would be rendered a bill for the $5,000.

Q. And was it understood then that the check for $5,000 was to be forthcoming immediately after the criminal prosecution was out the window, so to speak?

A. No. There wasn't any understanding when the check—when the invoice would be rendered, it would be rendered, when the work, that phase of the work, was completed, he would send us a bill and I would send him the check.

Q. So that the bill that he sent and you paid you have told us here, the $5,000 bill, that was for the balance of the $65,000 agreed upon, is that right?

A. That is correct.

Q. And the $60,000 was not to be paid until the Intelligence Unit had indicated that there would be no criminal prosecution, is that right?

A. Until we heard that there would be no—until we heard from the Intelligence Unit that there would be no prosecution, that is correct.

Q. That is until Tobias was satisfied by someone in authority that the criminal end of it was out the window?

A. That is right.

Q. And then when you did hear through Tobias that the Intelligence Unit or someone in authority had indicated to him that there would be no criminal prosecution, it was then or immediately thereafter that the $60,000 cash was

to be paid and the bill rendered for the $5,000 for which [fol. 46] you would send a check, is that right?

A. No, that is not what I said.

Q. Well now, tell me.

A. The money was released when we heard that the prosecution ended.

Q. Now when was that? Can I interrupt you to tell me when that was?

A. What date it was?

Q. To the best of your recollection, yes.

A. Somewhere between the end of September and the middle of October; I would place it approximately in that period.

Q. Well now, to refresh your recollection——

A. I am not quite sure.

Q. To refresh your recollection, if I may, can you tell us that that information was imparted to you or to Mr. Tobias and by him to you on or about the 28th day of October, 1948?

A. Well, I couldn't tell you the exact date. I don't know the exact date.

Q. You wouldn't disagree with that date?

A. I would disagree with that date, but I am not positive.

Q. Your memory—pardon me.

A. I am not positive that that is the date, but I wouldn't disagree that that is the date.

Q. No, I won't want you to agree to anything if you don't recall it. The way it resides in your mind at the moment is that October 28th, the date itself I have mentioned, does not mean anything to you, is that right?

A. Well, it does not mean anything. It may have been the date in question but it doesn't mean—I don't remember the date that we released the money.

Q. In other words, you are unable to say that it was the date, and you are unable at the moment to say it was not the date?

A. That is correct.

Q. In any event the bill was rendered for the $5,000 balance?

[fol. 47] Mr. Corbin: May I see the bill?

(Paper handed to Mr. Corbin.)

Q. (Continuing) On the following day, October 29th?

A. Well, if that is the date of the bill, October 29th.

Q. With a note at the bottom saying "Please be good enough to remit at your very earliest convenience," right?

A. Right.

Q. And that you did?

A. Yes.

Q. Now, did you have any correspondence with Schopick & Davis?

A. I don't remember any correspondence with Schopick & Davis.

Q. You had no agreement with them for services?

A. Oh, I know we had no written agreement, no.

Q. Did you have any written agreement with Mr. Ronayne for services?

A. No, sir.

Q. And from the time that you sent the check as you described to pay this balance of $5,000, from that time on down to the year 1952—or was it 1951 when you first heard about the Congressional investigation?

A. It was either the last part of 1951 or the early part of 1952.

Q. All right. Anyway, from the time that the $5,000 was paid down to the time when you first heard about the Congressional investigation, better than two years or more later, did you see Mr. Davis?

A. I don't remember seeing Mr. Davis in that period.

Q. Did you talk with him on the telephone?

A. I may have talked to him on the telephone.

Q. Well, you may have done anything. You don't recall it?

A. I don't recall talking to him, but I know he was in touch with my accountant's office for certain facts and paper. That I know.

Q. Well, you mean Tobias?

A. Yes, sir.

[fol. 48] Q. You mean you learned or heard something from Tobias about that?

A. Well, Mr. Tobias told me——

Q. Well, I say you heard it from Tobias?
A. That is right.
Q. But you personally didn't know?
A. Well——
Q. Except from what Tobias told you?
A. That is right.
Q. All right. Did you ever pay Schopick & Davis or either of them any other money for services rendered after October 29, 1948 in connection with——
A. Up to the present time, no.
Q. In connection with the civil matter or any other matter?
A. That is right.
Q. Have they ever rendered any bill?
A. No, sir.
Q. You say you haven't paid them up to the present time: Does that imply that you feel that you owe them money?
A. Well, I knew they did some work on the civil matter.
Q. I say, you think you are a debtor of theirs at the moment?
A. I think I would owe them money for some work they did, yes.
Q. How much?
A. Oh, I wouldn't put a price on their work. I don't know how much work they did, but I know they did work on it, on the civil case.

* * * * * * * *

[fol. 49] MONROE TOBIAS, called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Heffron:

* * * * * * *

Q. Do you know Louis Berman?
A. I do.

Q. Did you represent him in connection with a tax matter of his?

A. I did.

Q. When did you represent him?

A. I believe I first started on that matter in 1945.

Q. Who was involved in that tax matter?

A. Did you say who?

Q. Who was what was involved?

A. The tax matter concerned Louis Berman and his brother, Philip Berman, and two companies with which they had been connected prior by the name of Gotham Beef Company and Gotham Ship Purveyors, Incorporated. The years involved were the years of 1942, 1943, and 1944. The company had gone out of business sometime in around May of 1944, is my recollection.

I must explain this. Gotham Beef Company was a partnership which had existed up to the middle of 1943. It was succeeded by a corporation, the Gotham Ship Purveyors, Incorporated, which functioned for approximately 14 months. The companies had been wholesalers of meat. The companies' tax difficulty was that they had omitted over-ceiling amounts collected on sales and had correspondingly omitted over-ceiling amounts paid for purchases. The Government was willing to concede that they [fol. 50] had understated the sales but would not concede that they had understated the purchases.

Q. Did you have any proof available that the purchases were understated?

A. There was proof available.

Q. What did that consist of?

A. That consisted of various memoranda, invoices and receipts in the handwriting of an employee of the supplier of Gotham showing the exact amount of the over-ceiling payment that Gotham had had to make in order to buy the meat.

Q. Now, these slips that were available that show the over-ceiling payments: were there slips available to show what you claim for all the over-ceiling payments?

A. No.

Q. Approximately what percentage of what you claimed were the over-ceiling payments did these slips of paper represent?

A. I can't give you an exact figure on that. I would say, though, that it was under 10 per cent.

Q. Under 10 per cent?

A. Yes.

Q. So as to the balance of the over-ceiling payments on purchases there was no substantiation available?

A. That is correct.

Q. In what division of the Bureau of Internal Revenue was this tax matter being investigated?

A. Well, it had been in the revenue agent's office and very shortly thereafter was transferred over to the special agents' office.

Q. Where was it in July 1948?

A. In July 1948 it was at the special agents' office.

Q. And who was Mr. Berman's attorney at that time?

A. Mr. James A. Ronayne.

Q. Now, did you have a conversation with Louis Berman in 1948 with respect to his tax matter?

A. Yes, I did.

Q. What was that conversation?

A. Sometime in July 1948 Louis Berman came in to [fol. 54] see me at my office together with Mr. Merdinger who was my partner, explaining the fact that he had finally been able to reach Mr. Ronayne who, apparently, he had not been able to get to for some time, that Ronayne had told Mr. Berman that he was awfully sorry to have to relate this, that he was afraid that the case had been recommended for prosecution by the special agent. When Mr. Berman spoke with us he was almost in a state of shock; he was terribly upset. He said that he was going to get rid of Ronayne and he had to get somebody else to represent him. We tried to reassure him, explaining to him that we did not think that the matter was one for prosecution, and in spite of the fact that the special agents' office had recommended it or at least the special agent recommended it was no indication of the fact that it would be prosecuted, that there were six or seven higher echelons both here and in the Department of Justice where we felt that they would be convinced that there should be no criminal prosecution.

Q. Did this argument convince Mr. Berman?

A. It did not. Mr. Berman said, "Nevertheless, I never thought it would reach this stage. I think it is too late now to just let the thing go. I must have some other representation. Is there anybody you could recommend?"

Q. What did you do about that?

A. I called Mr. Leo Greenstein, an accountant, who had previously spoken with my partner, Harry Merdinger, mentioning the name of a certain law firm which he knew to be quite good. I called Greenstein and asked him for the name of the firm. He told me it was the firm of Schopick & Davis, and to call Irving Davis. I spoke with Mr. Berman. He said, "Please do that and arrange an appointment," and the appointment was made.

[fol. 52] Q. So thereafter you saw Irving Davis?

A. Yes. Mr. Davis came to my office pursuant to that appointment and at that first meeting were just Mr. Davis, Mr. Berman and myself. I described in some detail the nature of Mr. Berman's difficulties and asked Mr. Davis whether this is the sort of case he thought he could handle. Mr. Davis said he didn't know, that he would have to look into it and then would be in touch with Mr. Berman again.

Q. What happened after that?

A. A few days after that there was a call from Mr. Davis. He came down to see Mr. Berman and myself, saying that he had looked into the matter and found it was serious, that there had been a prosecution—a recommendation made by the special agent for prosecution, and that Davis couldn't do anything further in the matter unless he would have a power of attorney running to him. He said he needed that in order to get additional information; in the event that he still did not take on the case there would be no fee involved with the power.

Q. Were powers of attorney prepared?

A. Powers of attorney were prepared together with contingent fee statements.

Q. I show you Government's Exhibits 18 and 19 in evidence. Are these the powers of attorney of which you have just spoken?

A. Yes, they are.

Mr. Heffron: May we have this marked for identification.

(Paper marked Government's Exhibit 23 for identification.)

Q. I show you Government's Exhibit 23 for identification. Can you identify it?

A. These are the contingent fee statements that were [fol. 53] filed. They were filed together with the powers of attorney.

Mr. Singer: I can't hear a word.

The Witness: These are the contingent fee statements which were filed, and I believe were filed at the same time as the powers of attorney.

Mr. Heffron: I offer them in evidence, your Honor (handing to defense counsel).

The Court: Any objection?

Mr. Singer: Subject to connection?

The Court: They will be admitted subject to connection.

Mr. Corbin: They are not dated, but they have the stamp of the revenue agent in charge in Brooklyn, received November 9, 1948.

The Court: Received subject to connection.

(Government's Exhibit 23 for identification received in evidence.)

Q. Mr. Tobias, these contingent fee statements were prepared at the same time as the powers of attorney so far as you can recall?

A. Yes.

Q. Were they turned over to Mr. Davis in your presence?

A. They were.

Q. Tell the jury what a contingent fee statement is.

Mr. Singer: Well, I think they are in evidence. They speak for themselves.

The Court: Oh, I think that is a technical word of art used in the tax law that all tax lawyers know. So I think the witness can testify as an accountant acquainted with [fol. 54] tax matters as to what the purpose or significance of a contingent fee statement is.

The Witness: The general purpose and significance, so far as I know, is to put the Government on notice as to

the fact that an accountant or an attorney or a representative of a taxpayer has a contingent interest in the final settlement of a tax case.

The Court: If he does.

The Witness: If he has such; if he has none, he has to say he has none.

The Court: Is that required by the regulations of the Bureau of Internal Revenue when an attorney appears with the power of attorney, there must be a contingent fee statement filed?

The Witness: I don't know if that is part of the regulations. I do know it is part of the practice.

The Court: Well, I will advise as a matter of law that it is. Let me see one of those contingent fee statements that are in evidence.

Mr. Singer: I might say, your Honor, I always believed it was part of the regulations. I always believed it was.

Mr. Aranow: We have to make a statement of fees whether they are contingent or not.

Mr. Singer: No.

The Court: I thing there is no doubt. I have done some tax work, too, before I went on the bench. Whenever an attorney files a power of attorney, he has to file a statement indicating whether or not he is representing his client on a contingent fee basis or not. That is a matter of [fol. 55] either law or regulation in the Treasury Department.

These exhibits, Government's Exhibit 23, are all in the same form, Treasury Department Form 1171, entitled "Statement Relative to Fees to be Filed With Power of Attorney, State of New York, N. Y." with no date on it, but a stamp on it "Received November 9, 1948, Internal Revenue Agent in Charge, Brooklyn, New York"; and reads:

> "This is to certify that we have not entered into a contingent or partially-contingent fee agreement for the representation before the Department of Treasury in the matter of Lillian Berman, Philip Berman, Gotham Ship Purveyors, Inc. and Louis Berman under the terms of a power of attorney filed with the Treasury Department on"

blank, and it bears on it in handwriting what purports to be I. Davis, Merdinger & Company, Monroe Tobias, Harry Merdinger.

That is so that the jury may know what those exhibits say.

Go ahead.

By Mr. Heffron:

Q. As a matter of practice, Mr. Tobias, after a contingent fee statement is filed and a change occurs in the status of the fee, is it the practice to follow it up by amending the contingent fee statement?

Mr. Aranow: I object to that.

Mr. Singer: I object to it.

The Court: Objection sustained. What the practice is [fol. 56] doesn't make any difference. The practice may vary. What the regulations require may be something else.

Q. To your knowledge, Mr. Tobias, was there any other contingent fee statement ever filed in this tax matter?

A. Not to my knowledge.

Q. After these powers of attorney and contingent fee statement had been drawn up, what happened?

A. A few days after that, Mr. Davis, pursuant to telephone call, came to my office to meet with Mr. Berman, myself, and with him was another gentleman whom he introduced as Mr. Max Halperin, an attorney and associate of his who had space with him in his office.

Q. Do you see Mr. Halperin in the courtroom?

A. Yes, I do.

Q. Will you point him out?

A. Mr. Halperin has just stood up (indicating).

Mr. Heffron: May the record indicate that the witness has identified the defendant Max Halperin.

Q. What transpired at that meeting?

A. Mr. Davis said that they had been in touch—"they" meaning he and Mr. Halperin had been in touch—with their Washington associate and had discussed the case with him; that the case was a serious one; that, nevertheless, pursuant to the discussion, they felt that the criminal prosecu-

tion could be eliminated in the Berman-Gotham matters in New York. They then discussed the fees, and the first request for the fee was $100,000. Mr. Berman naturally was aghast. I was also considerably surprised at the size of the fee. There was further discussion there as to who this Washington associate was. I asked the name. [fol. 57] Mr. Davis said that that is no concern of mine, it is none of my business. However, this associate in Washington was a former government official, a man who was semi-retired, very wealthy, very influential; a man who had great standing in Washington before many of the governmental bureaus, including the Bureau of Internal Revenue; a man who, if he would submit evidence, would be believed, whereas somebody else submitting a similar kind of evidence might not be. It was because of this man's standing that they felt confident that the matter could be successfully handled by eliminating prosecution in New York. They further said that there would be no money that had to be put up, no retainer. They further said that they were so confident that they could handle the matter that they even wouldn't want any expenses for any of their out-of-town trips.

Berman offered them $25,000, and the meeting broke up with the understanding that they were going to again be in touch with their Washington associate.

Q. Do you recall whether Mr. Halperin said anything at that meeting?

A. Yes, Mr. Halperin said that he had known this man for many years in the past, but had fallen out of contact with him, but had recently come to know him again. He felt quite certain that this man would be able to help in eliminating the prosecution.

Q. Was anything said about a favor at this meeting?

A. In connection with the description of the Washington man and in connection with the reason why the fee had to be so large, that since this man was on a semi-retired basis, he wouldn't want to use up too many favors unless he were amply compensated.

Q. Were you told in what office of the Bureau of Internal Revenue criminal prosecution would be stopped?

[fol. 58] A. The discussion centered around it being stopped in the New York office.

Q. That is the New York special agents' office?

A. That is correct.

Q. In the description of the $100,000 fee, was it made contingent?

Mr. Aranow: Could we have all the conversation instead of leading the witness? I think we should have all the conversation and then if he can't recall, he can refresh his memory.

The Court: I think he just refreshed his recollection.

When he talked about the $100,000 fee, was there any contingency involved or was that to be paid in any event?

The Witness: No, nothing at all was to be paid unless the criminal prosecution had been eliminated. It was further understood that they were not at all concerned with the amount of the tax that might result by way of assessment, but it was either that they were completely successful in eliminating criminal prosecution in the New York special agents' office or there would be no fee at all.

Q. What happened after that meeting?

A. Shortly after that meeting, there was another meeting in which again Mr. Halperin and Mr. Davis met with Mr. Berman and myself, wherein we were told by Mr. Davis that Halperin had been in touch with the Washington associate, and that the Washington man had agreed together with them that the fee should be reduced to $75,000.

Davis at that time told us about some difficulty that he [fol. 59] had in trying to reach Mr. Bolich to make an appointment in New York——

Q. That is Mr. Daniel Bolich?

A. Yes, Mr. Daniel Bolich.

Q. Who was Mr. Daniel Bolich at that time?

A. Mr. Daniel Bolich, so far as I recall, was the special agent in charge at the New York office.

Q. Go ahead.

A. That he had been experiencing some difficulty in making an appointment with him, but that after Mr. Halperin had called someone in Washington, thereafter Mr. Davis again called Bolich and was able to get through to him.

Q. You said someone in Washington. Were you told who Mr. Halperin called in Washington?

A. By name? No. By description? That they had called their associate in Washington.

Q. Was any agreement reached on a fee at that meeting?

A. There was no agreement reached at that meeting because Mr. Berman still refused to pay a fee of that size and did come up, though, to $40,000. Again the meeting broke up on an inconclusive note.

Q. What developed thereafter with respect to the Berman tax matter?

A. Again, a few days after that, Mr. Davis and I, pursuant to an appointment made by Davis, went to the office of the special agent to meet with Mr. Kuel—I think his name is Herman Kuel, and he I think held the position of conferee or assistant to Mr. Baradell — at the special agents' office. At that meeting were Mr. Mullenbach, Mr. Davis, Mr. Berman and myself.

Q. Who was Mr. Mullenbach?

A. Mr. Mullenbach was the special agent who had been investigating the Gotham tax case.

Q. What was done at this meeting?

A. At that meeting, Mr. Davis explained to Mr. Kuel [fol. 60] and to Mr. Mullenbach exactly what the facts were in the case as he saw it, and also told them about the proof that we were going to be able to adduce as to the fact that there were typical transactions which Mr. Berman had, which showed that they had paid over ceiling for buying, and that that was the identical amount that they had charged over ceiling in selling.

Q. These typical transactions you refer to, are those the ones as to which you earlier testified there were only slips representing less than 10 per cent of those transactions?

A. Yes, but they were typical transactions so far as I knew.

Q. Did Mr. Kuel reach any decision at this meeting?

A. Mr. Kuel reached no decision at that meeting but asked me to prepare a schedule showing the tying in of the various items as to which I had been referring, and the meeting broke up.

Q. What happened thereafter on this case?

A. On this what?

Q. On the Berman tax case.

A. A few days after that, there was again a meeting between Mr. Davis, Mr. Halperin, Mr. Berman, myself.

I would like to stop at this point to say that there was a Mr. Hoffman at certain of these meetings, but I can't place him at any specific one. At the meeting that I refer, I can recall that there were Mr. Davis, Mr. Halperin, Mr. Berman and myself; that Halperin said that he had again been in touch with the Washington man, and they had finally convinced him, and this was the lowest they could possibly go, they were going to agree to $65,000 as a fee; that the only reason that the fee had been reduced to that extent was that they had convinced this man that a larger [fol. 61] case that they were handling—that the Berman case could be used as a guinea pig in connection with convincing other people in a larger case that they were handling. Berman agreed to come up to $55,000 and again there was no meeting of the minds on that score.

Halperin said that he thought that Berman was making a mistake; that he was awfully sorry, because he liked Berman; that he knew that this man had come down considerably, and that it was a shame he was letting $10,000 stand in the way.

Still Berman would not agree. Later in the day Berman told me that he had called Davis and had said, "All right, I'll go along with the $65,000 fee."

Q. Was there any further meeting?

A. Yes, there was a subsequent meeting which took place a short time after that at which were present Mr. Davis, Mr. Halperin, Mr. Berman and myself, in which we were told for the first time that the Washington associate insisted that his fee be put up in cash in advance in escrow, so that he be protected that Berman would not throw him out as he had thrown out Ronayne previously.

I advised Berman that——

Q. Were you told how much of the $65,000 was to be put up in cash?

A. That is right. The agreed-on fee, as it was told us, was that the Washington associate was to get $60,000 in cash to be put up in advance; that Davis and Halperin

were content to wait for their own, and that would be $5,000, which they would wait for and take by check.

Q. Did either Davis or Halperin suggest who should hold the $60,000 in cash for the Washington associate?

A. If you want me to continue the entire meeting, as I recall it, I can do that. The $60,000 was to be put up in [fol. 62] cash in advance, and it was to be put up to be held by Mr. Halperin, who was the only one that was going to be trusted in this deal by the Washington associate.

Mr. Berman refused. I refused, I advised Berman that——

Q. Before you get to that point, let me ask you this, Mr. Tobias. With respect to the $5,000, was that a contingent fee?

A. The $5,000 was as contingent as the $60,000 was, namely, that nothing was to be paid unless the criminal prosecution were to be eliminated in the New York office.

Q. Berman did not agree to having Halperin solely hold the money. What arrangement was worked out?

A. An arrangement was worked out where Mr. Halperin was to act as one of the escrowees representing their side, and that Mr. Leo Greenstein was to act as one of the escrowees representing Berman. Naturally, since Greenstein had not been consulted on this before, it was a question of getting him to agree.

Mr. Davis said that if it was acceptable to Berman, he would speak with Greenstein and find out if he was willing to serve.

The Witness: Now, the exact terms of the escrow as we had discussed it was that there would be a joint escrow, Mr. Halperin and Mr. Greenstein, that until I were to have heard with my own ears from the special agents' office from a responsible official there that was to be no criminal prosecution in the Gotham matter, only until I was advised and had heard it, the money was not to be released.

In the event that I had heard it I was to advise that to [fol. 63] Mr. Greenstein and then that the money would be released to Mr. Halperin.

Q. Released to whom?

A. To the other escrowee, Mr. Halperin.

Q. What happened after that arrangement was worked out?

A. After that arrangement was worked out, it was sometime I would say about a month after the meeting with Mr. Kuehl, at which Mr. Berman and I had met at our office, and just parenthetically, Berman had office space in our office, so it was a fairly simple thing for us to do—Mr. Berman on that particular day was in the office and had some bundles with him which were opened and I saw that there was a substantial amount of cash. Mr. Berman told me that there was $47,500 in cash that he had with him, that he had not been able to get the entire $60,000 up to that time, but nevertheless he was going to go over to Davis's office with that. Berman and I looked over the money without counting it, but merely counting the bundles, Berman showing me that this was five, this was ten, and a series of other thousands. So I saw that there was forty-seven, five subject to each individual bundle being counted. The money was wrapped up, put into a briefcase. Mr. Berman and I then took a cab to go over to the office of Schapick & Davis, at which—when we went up there we met Mr. Halperin and Mr. Davis; Leo Greenstein, to whom I referred to, and who was the second escrowee, was sitting in an outer room. I believe that was the first time I met him. I spoke with him and chatted with him a couple of minutes, introduced Louis Berman to him. Then Berman and I went into the inner office with Mr. Davis and with Mr. Halperin. The money was counted out there by Davis and Halperin, Louis Berman watching the counting and I just looking [fol. 64] over the proceedings from the room. After the money——

Q. How much money was counted?

A. Forty-seven five, and then Mr. Berman said, "I don't have the full sixty. I got $47,500 here. I will get the other twelve five in a week or so," and Mr. Halperin said, "That is all right, we will trust you for the balance."

After the money was counted, there was forty-seven five there, it was rewrapped. At that point Mr. Greenstein

was called into the room and I explained, since I had not myself spoken with Greenstein, I wanted to make sure he understood the nature of the escrow holding here, that it was to be a joint escrow, and the terms under which it was to be released; that was explained then, and the money rewrapped was put into a briefcase and Mr. Greenstein and Mr. Halperin left to open a vault so far as I know.

Q. After the $47,500 was paid did you learn that the balance of the $60,000 in cash had also been paid?

A. A couple of weeks later Mr. Berman told me he had been over to Davis's office with the other twelve five and had left it there.

Q. Well now, after the $60,000 had been paid did you get the result you bargained for?

A. Yes. Sometime in the latter of October I got a call from Mr. Davis saying that he had heard from Mr. Kuehl that there was to be no criminal prosecution in this matter. I told Davis that I would like him to make an appointment so that I could meet with him and Mr. Kuehl so I could hear this myself. The appointment was made for either the following day or the day after. I met with Mr. Kuehl. Mr. Kuehl said that this had been a borderline case, but he was convinced that under all the facts as he [fol. 65] saw them, that the evidence which we had submitted, that there should be no prosecution in the Gotham case.

Q. Now, with reference to this conference you had with Mr. Kuehl can you fix the time that the $47,500 was delivered to Halperin?

A. Well, there were two conferences with Mr. Kuehl. I would say that the forty-seven five was delivered about a month after my first conference.

Q. Well, can you fix the time of your first conference with Mr. Kuehl?

A. That I would say was about the middle of August. So that the turning over of the forty-seven five would have been about the middle of September?

Q. 1948?

A. Of 1948.

Q. Now, after an argument had been reached as to the fee, that is the $60,000 and the $5000 which you testified

was contingent, to your knowledge, was any attempt made to change the contingent fee statements which had been filed?

A. Not to my knowledge.

Mr. Singer: I object to that. They had not been filed. The record shows it wasn't filed until November 9.

The Court: There is no indication that they had been filed.

Q. When the contingent fee statements were executed what was done with them?

A. They were turned over to Mr. Davis.

Q. Now, in the course of these meetings with Mr. Halperin was there ever any occasion on which you discussed the merits of Mr. Berman's tax case with him?

A. I had discussed them with Mr. Davis, and they were not discussed at the subsequent meetings with Mr. Halperin.

[fol. 66] Q. Did he ever ask you what kind of substantiation you had?

A. He did not.

Q. You never told him anything about the merits of this case?

A. I don't believe that I did.

Q. In all these conferences with Mr. Halperin were you ever told the name of the man in Washington?

Mr. Aranow: I object to that. It has already been stated and repeated several times.

The Court: The objection is overruled. Finish your question.

(Last question read.)

The Witness: I never was.

Q. Were you ever told that this man in Washington was a lawyer?

A. I never was.

Q. Were you ever told that this man in Washington was an accountant?

A. I never was told that.

Q. Were you ever in any——

Mr. Singer: I object to this line of questioning; your Honor has said the same thing to me, that I may not put a question that way. On direct you can't do it, but on cross you may. Ask for any conversation, but not direct attention to what wasn't done.

The Court: Is this an objection or is this a lecture on evidence, Mr. Singer? I will sustain the objection if that is what it is.

Mr. MacMahon: May the Government be heard on that, your Honor? I submit the absence of conversation is just as much evidence as the existence of them.

The Court: I think it was brought out.

[fol. 67] Mr. Singer: If you want to do it, all right.

The Court: Wait a minute. I sustain the objection, Mr. Singer. Don't talk or I may reverse myself.

Mr. Singer: You are right. When you win you should walk home.

The Court: Go ahead.

Q. After criminal prosecution had been stopped, when you heard it from Mr. Kuehl, what did you do?

A. When Mr. Davis and I left that meeting, I congratulated him very heartily. He said, "I told you we could do it." He said, "Now I hope I will get a chance at the civil case."

I said, "Berman said you would if you were successful in this."

I went back to my office. I called—first I spoke to Mr. Berman who was the man most interested in this thing and told him that the criminal prosecution had been eliminated. I called Mr. Greenstein and told him that I had heard that the criminal prosecution was eliminated and therefore he could release the escrow money to Mr. Halperin. Greenstein said he would. A day or so later he called me back and said he had.

Q. Now, this conversation in which Davis referred to the civil liability of Mr. Berman: Can you fix any approximate time for that?

A. The date of the conversation?

Q. Yes. You said that Mr. Davis——

A. Well, that would have been the latter part of October, but nothing further was done until we had gotten the reve-

nue agent's report, which was sometime in November, I think November 17, if my recollection serves, of 1948.

[fol. 68] Q. At about the time that Davis was negotiating with Mr. Berman with respect to the fee was there any discussion during those meetings with respect to the civil liability?

A. Yes. The discussion as to the civil liability was that the fee which had been discussed of $65,000——

Mr. Corbin: May I have the time and place of this conversation fixed?

The Court: Well, finish that and then Mr. Heffron can ask that. Finish the answer.

The Witness: During the course of the discussions as to the fee which would be paid for the elimination of the criminal prosecution it was specifically told to Berman and myself that that fee had no bearing at all on what the ultimate tax liability was; they were not concerned with it; that all they were being hired to do was to eliminate criminal prosecution. However, Mr. Berman said, "In the event that you are able to eliminate criminal prosecution I would certainly want to give you a chance to then work on the civil tax case." Now, I can't recall which specific meeting that had been said at, but it was said at one of the meetings.

Q. Was work thereafter done on the civil liability?

A. Yes. Mr. Davis prepared a memorandum in connection with what we call transferee liability of the corporation and subsequently met with me and Mr. Sol Moscowitz, a conferee from the Brooklyn Internal Revenue Agents' office, and pursuant to that conference prepared a memorandum of law and submitted it in order to substantiate [fol. 69] the fact that we believed that the Government tax assessment was too high.

Q. What happened in December 1948?

A. In December 1948 there was a dinner party which I held at my home at which were Mr. Berman, Mr. Merdinger, Mr. Davis, Mr. Halperin, I believe Mr. Hoffman and I believe and our wives. It was purely a social gathering.

Q. Now, during 1949 was there any work done on the civil liability?

A. Yes, there was.

Q. What was that?

A. Well, we attended a conference, as I said. I met Mr. Moscowitz, who was a conferee of the Brooklyn Internal Revenue Agents' office, since we had protested the amount of the assessment submitted by the revenue agent. Mr. Davis and I attended that conference.

Q. Did you hear from Davis thereafter with respect to the civil liability?

A. Well, I can't fix a date, but there was a letter which I received from Mr. Davis either in 1951 or 1952. I say I can't fix the date because I haven't been able to find the letter in which he advised——

Mr. Corbin: No, Judge, I object to his recounting or assuming to recount the contents of a document.

The Court: If the letter cannot be found he has a right to recount it if it is within his recollection. If the letter is in existence, then it would speak for itself. He can recount what he recalls was in that letter, coming from an alleged co-conspirator. Let us get it.

Mr. Corbin: I object to that on the ground that no proper foundation has been laid for the recounting of the contents of the letter.

[fol. 70] The Court: The objection is noted. You may go ahead.

Mr. Corbin: I respectfully except.

The Witness: It was a letter directed to me by Mr. Davis saying that he and Mr. Schopick had dissolved or were in the process of dissolving the law partnership and to that end were trying to settle all the fees, and would I speak with Mr. Berman about the fee that they were to get for handling the civil tax case.

Mr. Corbin: I move to strike out the answer upon the same ground urged against its reception.

The Court: You have looked for such letter, have you?

The Witness: Yes, I have.

The Court: And been unable to find it?

The Witness: I haven't been able to find it.

The Court: But you are definite that that was the substance of the letter?

The Witness: Yes.

The Court: All right. The objection is overruled. You may have an exception.

Mr. Corbin: Thank you.

Q. Did you hear from Mr. Davis during 1950?

A. I don't think I heard from him in 1950.

Q. Did you hear from him in 1951?

A. I believe I did hear from him in 1951 toward the tail end of the year. It would be either late in 1951 or early in 1952, when Mr. Davis came to my office with Mr. Halperin to say that in connection with the Pattullo case about which I had read in the newspaper, that it was all a lot of fanfare, that the thing was going to be blowing over, that there was nothing to be concerned with and just relax [fol. 71] with it; that they had not spoken about the Gotham case and they were sure if everybody was silent that the whole thing would blow over in a short time.

Q. Now, who was "they"? Who said that, Mr. Davis or Mr. Halperin?

A. Mr. Davis said it. Mr. Halperin echoed it. I think it was—in other words, they both said it, each one in a different way at the same meeting.

Q. Did you see Mr. Davis and Mr. Halperin after that?

A. Yes, I saw Mr. Davis and Mr. Halperin after that again I would say sometime before March 15 of 1952. I would place it somewhere in February. At that meeting Mr. Davis and Mr. Halperin again said that this Pattullo case was still floating around in the papers, that their own books had been subpoenaed and examined, and that in the event that anybody were to come to speak to Berman or myself to refer them to Davis as Berman's attorney and for him to answer all of the questions.

Mr. Halperin said that he had done Berman a very good turn in the handling of his own tax case and he certainly wanted to ask Berman not to hurt him by talking in connection with the tax case now.

Q. Did Halperin say anything else?

A. Halperin said—I can't recall.

Q. Did you see Mr. Davis after that?

A. I saw Mr. Davis after that. This would be after March 15. Mr. Davis advised me that the Pattullo people

had gone into the grand jury and had told about the handling of the Pattullo case by Mr. Davis and Mr. Halperin; that he was afraid that since the Berman case had been handled by the same people at about the same time, that this case was also going to be coming up for examination or for action, and that, he asked Berman and myself to please not say anyth-ng.

[fol. 72] The Court: Not say anything to whom?

The Witness: Instead of—not saying anything, to please not talk about the case.

The Court: To anybody?

The Witness: To anybody who would approach us in connection with it.

Q. Did the name of Henry Grunewald come up at this meeting?

A. I asked Mr. Davis whether Grunewald was the man who was involved here and he said, as he had told me before, "It is none of your business."

Q. Did you see Mr. Halperin after that?

A. I saw Mr. Halperin probably a day or so after that and Halperin too, told me that the Pattullo people had been before the grand jury and had testified with respect to the handling of their tax case, that it was a terrible thing for them to have done, that he hopes that Berman wouldn't do the same thing to him because he had done Berman such a good turn; it would be a terrible thing. He said he had been in touch with the Washington associate and that he was going to stand silent, Halperin was going to stand silent and he hoped that Berman and I would likewise do the same thing. He pointed out that whereas the Pattullo people had an open tax year where they could have been, that the Government could have used a club to get them to testify by virtue of that open tax year, that wasn't the case so far as Berman was concerned.

Q. Now, you have just testified that Mr. Halperin told you that there was no open tax year of Berman, is that correct?

A. Yes.

Q. Now, do you recall when the last tax return on behalf of the Gotham Ship Purveyors, Inc. was filed?

A. I would say it was filed late in July 1947.

[fol. 73] Q. Now, this conversation you had with Mr. Halperin occurred when?

A. That would be in March of 1952.

Q. Did you thereafter testify before the grand jury in Brooklyn?

A. I did.

* * * * * * *

Cross-examination.

By Mr. Corbin:

Q. There is just one subject that I want to discuss with you, Mr. Witness, and that pertains to this matter of the civil end of the Gotham tax matter. As I understood you—and if I am wrong, you correct me—the arrangement that was made regarding the $65,000 that was to be paid pertained wholly and only to the criminal end of the matter.

A. That is correct, sir.

Q. When you learned that that matter was out the window, so to speak, after your talk with—who was it you talked to?

A. Mr. Kuehl.

Q. Mr. Kuehl?

A. I think that is K-u-e-h-l-l.

Q. Then it was as you were walking away from that conference that Davis said to you in words or substance, "I hope I can make some deal about the civil end of it now."

A. When you say make some deal about the civil end of it, that is not correct.

Q. What were the words, if you can give them to me?

A. "I hope that I can now work on the civil tax matter"; but that was not the first time that it had been discussed.

Q. At that time, he, Davis, was expressing to you a hope that he might be able to thereafter work on the civil end of it?

A. That is correct.

Q. Up to that time there had been no deal on that score. Is that right?

A. You keep mentioning the deal, and I don't know why.

[fol. 74] Q. He made an arrangement for a fee for services for acting on the civil end of it. Was there any talk, so far as you know, or any deal or arrangement or terms agreed upon or discussed for the handling of the civil end of it up to that time that the criminal end went out the window? Just Yes or No, if you can.

A. I can't give a Yes or No on that.

The Court: Give an answer.

Q. Don't answer it if you can't answer it Yes or No, because that is all I want.

Mr. Heffron: I think the witness is entitled to answer the question.

The Court: I think the witness is entitled to answer. If he can say yes in part or no in part, he can give the answer.

You have asked a question. In a long involved question like that, a witness does not have to say yes or no. He can answer the question.

Answer the question.

The Witness: I would like to have it repeated now.

The Court: The stenographer will read the question.

(Question read.)

The Witness: The prior discussion had been that Mr. Berman said to Mr. Davis that in the event they were successful in eliminating criminal prosecution, he would be only too happy to have him handle the civil tax matter, but no discussion as to fees or terms or amount of payment was discussed.

[fol. 75] Q. And no actual retainer?

A. And no actual retainer signed.

Q. Or made either in writing or orally. Is that right?

A. That would be correct.

Q. Now, you told us that at some time I think the following year, 1949, there was a conference with one Moskowitz in Brooklyn?

A. That is right.

Q. And that Mr. Davis did go over there with you on that occasion?

A. Yes, sir.

Q. You also told us that Davis prepared a memorandum of facts and of law?

A. That is correct.

Q. Have you a copy of that?

A. I had a copy which I submitted to Mr. Heffron.

Q. Is that something that you worked on with Davis?

A. We had consulted with Mr. Davis, but he prepared that memorandum of law.

Q. I understood that Mr. Kuehl had asked you to prepare the statement of facts.

A. We are talking about different things.

Q. Did you prepare a statement of facts that was used before Moskowitz?

A. No. Mr. Kuehl was in one division. We are talking now you are back in 1948. Mr. Moskowitz is in a different division in 1949.

Q. Answer my first question. Did you prepare a statement of facts in 1948?

A. A statement of facts?

Q. Yes.

A. No, sir, I did prepare a schedule showing the typical transactions that had been entered into. That I did prepare and that I did submit.

Q. Was that the statement that was used in whole or in part during your conference with Mr. Moskowitz the following year, 1949?

A. No, sir.

Q. Was the statement or brief on the facts that was used with Mr. Moskowitz prepared by you?

A. That was prepared by Mr. Davis.

[fol. 76] Q. Is that statement or brief on the facts, as well as the brief that you stated Davis prepared on the law, in the possession of the district attorney now?

A. I believe it is.

Q. You gave them both to the district attorney, Mr. Heffron?

A. They are not both. We are talking about one brief——

Q. I thought you said there were two briefs, one on the facts and one on the law. I see I am mistaken.

A. If I said that, I didn't mean that.

Q. So there was one brief, one paper, one document?

A. Yes.

Q. Which dealt alike with both facts and law. Is that it?

A. That is correct.

Q. And that is the paper that you have given to Mr. Heffron?

A. Yes, sir.

Q. Did Mr. Davis render any bill for services for the preparation of that brief?

A. He did not.

Q. Or for attending that conference with Mr. Moskowitz?

Q. Did you know of any arrangement that was made between Berman and Davis?

A. With respect to what?

Q. I am just going to tell you.

A. I am sorry.

Q. With respect to the preparation of this brief or the appearance at this hearing before Mr. Moskowitz.

A. Well, the general understanding——

Q. I don't want general understanding.

A. Then I can't answer it.

Q. All right. You say you had a dinner party in late 1948 and didn't hear from Davis except at the time of the conference with Moskowitz until 1951 or 1952, right?

A. I think I may have met Mr. Davis once after that on a social visit at his own home. Other than that, my only [fol. 77] contact with him had been in connection with the civil tax matter, which my recollection is took place in 1949. I believe that what you have just said is correct.

Q. That involved the one talk with Mr. Moskowitz and the one brief or memorandum that was referred to. Is that right?

A. Generally speaking, I would say Yes, except for the fact that we had met in advance of the meeting with Mr. Moskowitz to discuss the matter and had to approach it at the conference.

Q. So that in advance of the conference and in advance of the preparation of the brief, you had one talk with Davis?

A. Yes, I would say so.

Q. Where was that, at his office or yours?

A. Probably at my office.

* * * * * * *

The Court: While you are on income tax returns, may I ask a question that has been puzzling me.

Did you prepare the income tax returns for Mr. Berman and his companies from 1948 on?

The Witness: From 1948 on. We had not prepared them for 1942, 1943, and 1944 with the exception of that one late return.

The Court: Was any deduction taken in any of those income tax returns for fees paid to Schopick & Davis?

The Witness: $5000.

The Court: $60,000 was not taken as a deduction?

The Witness: That is correct.

[fol. 78] The Court: Can you give any reason why the $60,000 was not taken as a deduction?

The Witness: Yes, sir.

The Court: What reason?

The Witness: It did not seem to me to be an ordinary, necessary and reasonable expense and therefore we could not deduct it.

The Court: But you testified that you thought it was a perfectly proper expense?

The Witness: Yes, sir, but not deductible on an income tax basis. I had argued with Mr. Berman from the very first that I thought the entire fees were excessive.

The Court: But you thought it was a legal fee that was being paid of $60,000?

The Witness: Yes, sir.

By Mr. Singer:

* * * * * * *

Q. We come to 1951. When do you say you saw Halperin?

A. I would say it would be either very late in 1951 or early in 1952.

Q. That was the time when you say Halperin came to your office with Mr. Davis?

A. Yes.

Q. That was the time when you say Halperin came to you say you saw Halperin how many times?

A. From when to when?

Q. From this first time in late 1951 or early 1952, how many times did you talk to Mr. Halperin after that?

A. I would say, starting with that group of meetings, it would be approximately three.

[fol. 79] Q. And all of them before you testified before the grand jury in Brooklyn?

A. Yes, sir.

Q. And no time after you testified before the grand jury in Brooklyn?

A. I don't believe so.

Q. You can't fix the date of any of these three meetings that you spoke of, the exact date?

A. By the day?

Q. Yes.

A. No, sir.

Q. Can you fix it only from the last part of 1951 up to the time when you testified before the grand jury in Brooklyn?

A. No, I have a different focal date for it.

Q. What is that?

A. March 15, 1952.

Q. Is that date a matter of record?

A. No, it is a matter of my recollection.

Q. Memory?

A. Yes.

Q. Depending purely on your own memory?

A. Yes, sir.

Q. Not in regard to any record which could be checked?

A. One other record that could be checked.

Q. What is that record?

A. The date of my subpoena before the Brooklyn Grand Jury.

Q. It was the very same date?

A. No, sir.

Q. It was before or after it?

A. It was before it.

Q. Do you know the date when you were subpoenaed before the Brooklyn Grand Jury?

A. I believe it was April 17.

Q. So that March 15 is before April 17?

A. Yes, sir.

Q. What is the relationship between March 15th and April 17th? I don't get it. You said you are sure of one day and you say you fix that date because it was before April 17th?

A. Yes.

Q. Well, there were, to put it mildly, one hundred and some-odd days that were before April 17th.

[fol. 80] The Court: Let the witness give an answer to the question.

Q. Was it because March 15th was the last day that income tax returns had to be filed and you were working very hard that day?

A. No, sir, it wasn't that.

The Court: Let the witness answer. Have you got any particular answer?

The Witness: Yes, I do.

The Court: Go ahead.

The Witness: Mr. Davis had appeared at our office sometime after March 15th, saying that he had learned that Pattullo Modes people had gone into the grand juryroom and testified in connection with the handling of that Pattullo Modes case.

Q. How does that fix the time that you say you saw Halperin on March 15th?

A. I didn't say that I had seen Mr. Halperin on March 15th. I said I saw him subsequent to March 15th, but that was a focal date.

Q. Perhaps I don't know what "focal" means.

A. It is a date of reference in my mind.

Q. So it was not March 15th?

A. It was not on March 15th.

Q. It was after March 15th?

A. Yes, sir.

Q. Let us take the first time you saw him in the latter part of 1951 or early 1952. Christmas or New Year's is a focal date?

A. No.

Q. Was it before or after Christmas and New Year's?

A. I would be inclined to think it was in early 1952, after New Year's.

[fol. 81] Q. That would be sometime in January?

A. That is right.

* * * * * * *

By the Court:

Q. You said you handled all the income tax returns for the Gotham Beef Company after 1948, is that right?

A. Well, there was no such thing as Gotham Beef Company then.

Q. Or Mr. Berman.

A. Yes.

Q. Do you know the provision in the income tax regulations for information returns on fees that are paid to lawyers over $1,000 in any one year?

A. Yes.

Q. Was any such information return filed to show fees paid to Schopick & Davis?

A. I don't believe so.

Q. None at all?

A. I don't think so.

Q. Not even with respect to the $5,000?

A. I am not even sure as to that.

The Court: All right.

* * * * * * *

LEO GREENSTEIN, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Heffron:

* * * * * * *

Q. Now, do you know Irving Davis?

A. I do.

Q. And did you have occasion to see him in the summer of 1947?

A. I saw Mr. Davis in the summer of 1947 pursuant to [fol. 82] a telephone call that he had made to me. I went over to his office and he told me that he had been retained by Pattullo Modes to act as counsel for them on a tax matter.

The Court: Long before that had you met Mr. Davis, Mr. Greenstein?

The Witness: I had known Mr. Davis close to 30 years.

The Court: Socially or from a business standpoint or what?

The Witness: Both.

The Court: Go ahead.

The Witness: Mr. Davis when he called me over explained that he had been retained by Pattullo Modes, a dress concern, to act—at least he said the firm of Schopick & Davis was retained to act as counsel for them and he asked whether my firm would make an audit, an independent audit of the books of Pattullo Modes with a view of reconstructing their income for a period of years, I believe covering 1942 to 1946, and also with a view of determining what their off-the-record sales were.

He also explained to me that a Mr. Smith who was an accountant for Pattullo Modes would aid us in this work and that we would have to pay Mr. Smith for his services from whatever fees we received from Pattullo Modes.

I agreed on behalf of my firm to take the assignment.

Q. What happened after that?

A. I would say within a week the books of Pattullo Modes were brought over to our office. My staff was assigned to [fol. 83] the work, and within several months we completed it, drew a report, submitted it to Schopick & Davis, and the books were returned to Pattullo Modes, Mr. Smith working along with us during this period, and subsequently we received a check for our services in the amount of $5000.

Mr. Heffron: May I have this marked.

(Paper marked Government's Exhibit 24 for identification.)

Q. Mr. Greenstein, I show you Government's Exhibit 24 for identification. Can you identify it?

A. This is a check received by Weisberg & Greenstein from Pattullo Modes dated October 30, 1947 in the amount of $5000, endorsed by us.

Mr. Heffron: I offer it in evidence.

The Court: Is that the check you referred to? Is that the payment of fees you referred to?

The Witness: Yes, your Honor.

The Court: All right. Any objection? Admitted subject to connection.

(Marked Government's Exhibit 24.)

Q. Now, Mr. Greenstein, did you personally do any of the work of compiling and writing, making the audit of Pattullo Modes?

A. No, sir. May I supplement that: My staff worked on it. I didn't work on the matter.

Q. Now, do you know Mr. Harry Merdinger, Mr. Greenstein?

A. I do. Harry Merdinger is a friend of mine.

Q. And who is he?

A. Harry Merdinger is a certified public accountant, a [fol. 84] member of the firm of Harry Merdinger & Company; Harry Merdinger & Company.

. . . . . .

Q. Had any agreement been made by you with Davis or Halperin or Berman or Tobias for any compensation to be paid to you for acting as this escrow agent?

A. No, there was no such agreement, and I did it because they were all friends of mine and I wanted to do them a favor.

Q. Were you eventually paid anything for your services?

A. Yes. I checked my records some time ago and I found that I got a check of $570 from Schopick & Davis, around the same time, towards the latter part of 1948.

Q. That is your best recollection, that that check was paid to you?

A. As far as I know, and I am not sure, Mr. Heffron. As far as I know, I can identify that as being payment received for whatever I did.

Q. Now, did you ever ask Mr. Halperin who this Washington correspondent was?

A. I did.

Q. On numerous occasions?

A. I would say on a few occasions.

Q. Well, what was the answer?

A. Well, Mr. Halperin wouldn't tell me. He said it was confidential and I respected what he said and I didn't go any further.

Q. Did there come a time when you did some further work on the Pattullo Modes matter?

A. Yes. Towards the end of 1948, either in November or December 1948, Mr. Davis asked us to do some supplemental work, accounting work, this time to prepare net worth statements and cost of living statements for the individual officers of Pattullo Modes. He also stated that [fol. 85] Mr. Smith would again collaborate with us on the work and that we would be expected to pay Mr. Smith for whatever services he rendered. We accepted that assignment as well, and within a few days my staff started to work on that: the individual records of the Pattullo people were sent over to our office and we started to prepare the necessary statements. We completed that work, I would say, somewhere at the beginning of 1949, possibly around January or February, when we submitted all the cost of living statements and net worth statements to the firm of Schopick & Davis.

Q. You said "we," Mr. Greenstein. Did you do any of the actual work of preparing the net worth or cost of living statements?

A. I did not, Mr. Heffron.

Q. That was done by members of your staff?

A. My staff did that.

Q. You testified you knew Mr. Davis for thirty years?

A. That is correct.

Q. How long did you know Mr. Halperin?

A. Ever since he had been in the office with Mr. Davis, I believe, at 521 Fifth Avenue. I would say I know Max for probably around 12 years.

Q. After the work had been completed on the Pattullo Modes case and after you acted as escrowee of the Gotham

Beef case, did you have occasion to see Davis and Halperin?

A. I saw them many times, Mr. Heffron.

Q. What were those occasions?

A. Well, I would have lunch with them. I would see them. I was very friendly with all of them. I saw them many times.

Q. Do you remember the time when the King Committee was holding hearings?

A. When the King Committee was holding hearings? Yes, I recall that. That was sometime around the summer of 1951, I believe.

[fol. 86] Q. Incidentally, Mr. Greenstein, were you ever told by either Davis or Halperin that there was a Washington associate involved in the Pattullo Moles case?

A. No, sir.

Q. Do you remember any other conversations with Mr. Halperin?

A. I had a great many conversations with Mr. Halperin, of course, which I just don't remember, I think I recall one——

Q. Do you remember any conversation with Max Halperin at which the name Grunewald came up?

A. Yes, I remember one particular conversation because it stands out, because the name Grunewald came up and I had read about him in the newspapers, of course.

Mr. Corbin: I move to strike that out.

The Court: Strike what out?

Mr. Corbin: That he had read something in the newspapers.

The Court: I won't strike it out. He says that is why it came to his mind.

Mr. Corbin: That is the point of my motion to strike.

The Court: The motion to strike is denied. You may have exception.

The Witness: The thing that stands in my mind at that conversation—we were having lunch—I think it was Mr. Davis, Mr. Halperin and myself, and during that luncheon conference, I happened to hear Max say he had either been to Washington or was going to Washington to see Mr. Grunewald, and then my ears perked up and I

said, "Max, are you a friend of Mr. Grunewald?" He [fol. 87] said, "Yes, he is a friend of mine."

I said, "What sort of a man is he?" And he said, "He is an important man," and that was it.

Q. Going back to the work you did for Pattullo Modes on the net worth and cost of living statements, were you paid for that work?

A. Yes, sir, we were paid, Mr. Heffron, the sum of $3300, which represented a compromise with the Pattullo people, and from that amount we remitted the sum of $500, I believe, to Smith's office.

* * * * * * *

Q. Mr. Greenstein, do you recall any incident involving a subpoena directed to you or your firm with respect to the work papers of the Pattullo Modes matter?

A. I do, Mr. Heffron. I would say sometime during the summer of 1951 we received—that is, my office received—a subpoena from the King Committee to turn over all the work papers that we had to them. We searched our office records and found that we did not have the work papers.

I communicated with Mr. Irving Davis of Schopick & Davis and asked him whether he had the work papers because we did not have them. He said that he didn't have them either, but he would try to check into it and call us back.

Either that day or the following day he called back and he said that he located the work papers. They were over at the Pattullo place of business. He said, "If you would come over, Leo, to Pattullo's in the evening with me, I will turn the papers over to you."

That evening, accompanied by Mr. Weisberg, my part- [fol. 88] ner, and a member of our staff, we went over to the Pattullo place of business and Mr. Davis was there and I think Mr. Smith, the accountant for the company, was there. They located the papers. They were put into a package, and we took them back to our office that night.

The following morning I received a telephone call from Mr. Davis. Mr. Davis said, "Leo, I am sorry, but you can't turn those papers over to the King Committee."

I said, "Why?"

He said, "Because they are the personal property of the clients. They contain confidential information, and if you turn those papers over, you are letting yourself in for a lawsuit."

* * * * * * *

Cross-examination.

By Mr. Singer:

* * * * * * *

Q. All during this time right up to the time when you prepared these net worth statements, you were also seeing Mr. Halperin, weren't you?

A. Yes, sir.

Q. All through 1947 and 1948. Is that right?

A. Yes, sir.

Q. You said you knew Mr. Halperin socially as well as in a business way?

A. Yes, I was a friend of Max Halperin, and I hope I still am.

Q. Had you ever recommended a law matter to Mr. Halperin?

A. I don't think so.

Q. Had you ever done any work for Mr. Halperin?

A. Several occasions.

[fol. 89] Q. For clients of his or his own personal matter?

A. For his own clients.

Q. Had Mr. Halperin ever asked you to do anything improper?

Mr. MacMahon: I object. It is immaterial.

The Court: I will allow it.

A. No, sir.

Q. While you were doing the Pattullo work for Davis and Pattullo, did Mr. Halperin ever discuss your work with you on the Pattullo case?

A. I don't think Mr. Halperin ever discussed the case with me.

Q. In November, 1948, was Mr. Halperin ever present when Davis or anyone discussed any of these net worth statements or any of the work that you were doing at that time in the Pattullo matter?

A. Not to my recollection, Mr. Singer.

Q. Would you say that your best recollection is that he did not?

A. That is my best recollection.

Q. So that you can say now, although you knew Mr. Halperin during 1947 and 1948, and he was your friend both socially and in business, he never in any way as far as you can remember indicated the slightest interest in the Pattullo matter?

A. Not with me, he didn't, Mr. Singer.

Q. Or with anybody else in your presence?

A. Not to my knowledge, Mr. Singer.

Q. Are we definite and positive on that point?

A. Definite.

. . . . . .

Mr. Singer: Now I offer the receipt in evidence.

The Witness: That receipt is a definite mistake, Mr. Singer——

[fol. 90] The Court: Wait a minute.

Mr. MacMahon: Your Honor, may we examine preliminarily with respect to this receipt?

The Court: Let me look at it.

(Document handed to Court.)

By the Court:

Q. This is a receipt, this Exhibit J, which you received at the time you paid the money?

A. That isn't my address, 535 Fifth Avenue.

Q. That is not?

A. That is not. I never had an office at 535 Fifth Avenue.

Q. Did you ever see that receipt before?

A. May I see that, your Honor? Of course, not. This was never issued to me.

Q. You have never seen it?

A. I have not.

By Mr. Singer:

Q. You say you have never seen that receipt before?
A. No, sir.
Q. And it was not issued to you in connection with the payment of the fee for renting this box?
A. I don't believe it, Mr. Singer.
Q. You don't believe it?
A. No, sir, I do not believe it.

Mr. Singer: May I have his answer read back that he gave just before I offered this paper in evidence?
The Court: Yes.

(The reporter read back the following question and answer: "Q. I show you a paper marked Defendants' Exhibit J for identification. Will you look at it (handing)? Is [fol. 91] that the receipt for the box we are talking about? A. It seems to be.")

Mr. Singer: I offer it in evidence.
The Witness: I didn't examine that carefully enough, Mr. Singer.
Mr. MacMahon: Your Honor, the Government objects to it. The witness has never said he had it. It is not identified by this witness in any way, shape or form.
The Court: Did you ever get that physical piece of paper? Was that ever given to you?
The Witness: No, it was not.
The Court: Are you getting somebody here from the safe deposit company?
Mr. MacMahon: Yes, your Honor.
The Witness: I never had an office at 535 Fifth Avenue, your Honor.
The Court: We will exclude it from evidence for the present on the understanding that there will be somebody here from the safe deposit company, and it can be submitted to that somebody from the safe deposit company at that time, and your offer can be renewed at that time. This witness said he did not receive it.

By the Court:

Q. When you emptied the box of this paper package, so that there was just an empty box left——

A. That is right, there was nothing in it.

[fol. 92] Q. Now, what did you do then? Did you give that box back to have it locked up by the attendant or did you just turn the box in and say you were giving it up at that time?

A. I think we told him we were giving up the box at that time, turned the keys over, and that ended it, but didn't ask for the refund at that time. Later on I went there and got a refund. We turned everything over to the bank at that time.

Q. The keys and——

A. Everything.

The Court: We will now adjourn until 2 o'clock.

(Recess to 2.00 p. m.)

AFTERNOON SESSION

LEO GREENSTEIN resumed the stand.

Cross-examination (continued).

By Mr. Singer:

Q. During the lunch period have you had an opportunity to reflect and think about this receipt J for identification (handing to witness)?

A. Yes, I have.

Q. Has your memory been refreshed about it at all?

A. I never saw this receipt.

Q. As far as you know you were the one who was there when the vault was opened?

A. And so was Mr. Halperin.

Q. And as far as you know only you and Mr. Halperin were there?

A. That is correct.

Q. It was a bank with whom you had been doing some business prior to that time?

A. I do business with a great many banks.

[fol. 93] Q. It was a bank in which you knew some of the personnel?

A. True.

Q. It was a bank in which you had an account?

A. Yes.

Q. Your business account as well as your personal account?

A. Yes.

Q. It was a bank in which you had your own vault?

A. No.

Q. At that time?

A. I don't think so.

Q. Now, did you know any of the personnel in the vault department of that bank?

A. No.

Q. As distinguished from any of the other people whom you might know in connection with your regular accounting business?

A. No. Maybe slightly from seeing them around.

Q. Now, you do remember, however, that you did sign some kind of signature card?

A. Yes.

Q. And you do remember that when you signed the signature card, you signed it as well as Halperin?

A. That is true.

Q. Do you know whether or not you gave an address on that card, the signature card?

A. I am sure I did.

Q. And if you did do you remember what that address was?

A. Yes. 1440 Broadway.

Q. You wouldn't have given your home address?

A. I don't think so.

Q. Now, do you remember whether Halperin gave an address?

A. I am pretty sure he did.

Q. Would you remember whether he gave his home address or his business address?

A. My feeling is that he gave 521 Fifth Avenue, but I am not sure of that.

[fol. 94] Q. That would be his business address?

A. That is right.

Q. Now, do you remember that when you entered the vault the second time, that before you entered it you had to sign your name and Mr. Halperin had to sign his name?

A. That I don't recollect, Mr. Singer.

Q. And a comparison was made between the handwriting on that slip and the handwriting on the signature card?

A. That is probably so, Mr. Singer.

Q. Do you remember, I think you testified when the Court asked you, you say you left the two keys on the day when you made the second trip to the box?

A. That is right.

Q. Halperin surrendered his key and you surrendered yours?

A. That is right.

Q. So that I would be correct in stating that when you went back for the refund there were no keys at all?

A. That is right.

Q. And when you surrendered the keys on this date sometime between September 15th and November 17th, 1948, the date when you surrendered the vault, you notified the bank that the vault had been surrendered?

A. Yes.

Q. And you returned the two keys?

A. Yes.

Q. And that you say would be about a month after September 15th, without holding you to any date?

A. That is right.

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[fol. 95] Milton Hoffman, called as a witness on behalf of the Government, being duly sworn, testified as follows:

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Cross-examination (continued).

By Mr. Singer:

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Q. Remember again, will you please, whether it was in this first talk with the taxpayers that either you or

Davis said to the taxpayers in your presence, "Well, now, look, from now on, we will have to put our own accountants in to do this work because Smith can't do it." Isn't that right? Wasn't that all part of this first talk?

A. Yes.

Q. Right then and there——

A. Excuse me, Mr. Singer. I am sorry to interrupt you. May I go back on this last question? I didn't finish my answer.

Q. Certainly.

A. We thought it would be—Mr. Davis and myself thought it would be better that if an outside accountant, who had no interest, came in to audit the books.

Q. And you also said——

A. And that was also—no, I will stop there.

Q. That was also said to Smith before he ever brought the clients up into the office. Isn't that right?

A. No, I was going to say and that was also at the suggestion of Max Steinberg.

* * * * * * *

[fol. 96] Q. Now, we come to the next time. Now, there came a case known as the Gotham Beef case. Do you remember that?

A. Yes, sir.

Q. That was about the time that you say that Mr. Halperin told you he was trying to re-establish his friendship with Mr. Grunewald. Isn't that it?

A. Yes, sir.

Q. It came about the same time. Is that right?

A. About that time.

Q. Then you say that you and Mr. Halperin made a trip to Washington in connection with that matter?

A. Yes, sir.

Q. I assume all these trips were made and the expenses paid for through Schopick, Davis and Hoffman. Isn't that right?

A. Yes, sir.

Q. And I assume there are books and records which

would show a charge for a particular trip or an expense voucher. Is that correct?

A. Yes, sir.

* * * * * * *

Q. Will you please focus your attention on this first trip to Washington with Mr. Halperin. It was the first trip you say you had ever made. Is that right?

A. That is correct.

Q. Halperin went upstairs in the Washington Hotel. Is that right?

A. Yes, sir.

Q. What floor he went to, you don't know?

A. No, sir.

Q. Whom he saw you didn't see?

A. I did not see.

Q. He came downstairs, and he told you that he had seen some man named Grunewald?

A. Yes, sir.

[fol. 97] Q. He told you that Grunewald had made a telephone call to somebody?

A. Yes, sir.

Q. Something about "Captain Henry; put a red flag on something"?

A. That "This is Captain Henry; put a red flag, red stop, on the Gotham Beef case."

* * * * * * *

Q. Incidentally, you have never told us, have you, that Mr. Halperin received a fee by check in the Pattullo matter?

A. No, I didn't tell you, sir. I wasn't asked.

Q. But that is a fact, isn't it?

A. Yes, sir.

Q. Could you tell me when it was that he received payment?

A. I don't know, Mr. Singer.

Q. Let us see whether you can remember it. Was it before the vault incident, when you say you went down to count this money, or was it after it?

A. I don't know, Mr. Singer.

Q. That money that you paid Mr. Halperin came out of the fee, and that meant you got less?

A. Yes, sir.

. . . . . .

Q. It was completely, so far as you know, a matter of complete faith by you and Davis and Halperin's honesty that he wouldn't steal the $100,000?

A. Yes, sir.

Q. That $100,000 was put up, as I understand it, before this result you have been talking about was actually accomplished?

A. Yes, sir.

Q. So that the clients trusted you, and you in turn trusted Halperin completely?

A. Yes, sir.

Q. Incidentally, was there a receipt or anything issued [fol. 98] to these clients for the $100,000 in case you people ran off with the money?

A. No, sir.

. . . . . .

Q. So far as I can then understand, Mr. Schopick never went to Washington with you on any of these trips?

A. Yes, sir.

Q. When Mr. Davis and you were having conferences with the taxpayers—that is the Pattullo people—Mr. Schopick was not present?

A. No, sir.

Q. When you say you had these discussions with Mr. Schwaeber and Saver, one or the other, Mr. Schopick was not present?

A. No, sir.

Q. Now, when you say you were present and the Pattullo people brought this envelope over with what you have said contained money, Mr. Schopick was not present?

A. He was in the office, but I don't think he was present in the room.

Q. And when you first discussed the case with Mr. Smith, Mr. Schopick wasn't present. Is that right?

A. No, sir.

Q. And when Davis and you discussed it with Marks and Mrs. Segel, Schopick wasn't present?

A. No, sir.

Q. Schopick was, however, present when the vault at the Chemical Bank was opened by Halperin, as you say, and the money was counted?

A. Yes, sir.

Q. I think the only other time that Schopick was present was when you say—although he didn't see it as I gather—you gave Schwaeber some box or package, and as he, Schwaeber, was leaving the office, Schopick bumped into him. Is that right?

[fol. 99] Mr. O'Hara: I object to the form of that question. It covers I don't know what and it doesn't say what incidents or anything else.

The Court: Objection sustained.

Q. I am speaking about this particular incident when you say you gave Mr. Schwaeber a package in your office. Isn't that right?

A. Yes, sir.

Q. That is the only time you say you ever gave him a package?

A. That is correct.

Q. And Mr. Schopick wasn't there when you gave him the package?

A. No, sir.

Q. Mr. Schopick, so far as you know, didn't see anything in connection with the transfer of any package?

A. No, sir.

Q. Except, as you say, as he, Schwaeber, was leaving, Schopick was coming in the front door of the office and they bumped into each other?

A. Yes, sir.

Q. And Schopick wasn't there when Davis gave you the package?

A. No, sir.

* * * * * * *

Re-direct Examination.

By Mr. O'Hara:

* * * * * * *

Q. Have you ever heard of a man by the name of Oliphant?

A. Yes, sir.

Q. When did you hear about him?

A. Sometime after the criminal prosecution—sometime after the ruling that there would be no criminal prosecution in the Pattullo case.

[fol. 100] Q. Or whom did you hear about him from?

A. Mr. Halperin.

Q. What did Mr. Halperin have to say to you about that?

A. Mr. Halperin had an appointment with Mr. Oliphant.

Q. Did Mr. Halperin tell you how he made the appointment with Mr. Oliphant?

A. Yes, sir.

Q. How did he make it?

A. He got the appointment through Mr. Grunewald.

* * * * * * *

Herman F. Kuehl, called as a witness in behalf of the Government, being first duly sworn, testified as follows:

Cross-examination.

By Mr. Aranow:

* * * * * * *

Q. You had a telephone conversation with Mr. Bolich, and Mr. Bolich told you what Mr. Davis claimed. Is that correct?

A. That is correct.

Q. Do you know whether Mr. Davis and Mr. Bolich were actually together at that time, at the time you phoned him?

A. I could only gather from the telephone call.

Q. Soon thereafter Mr. Davis came to your office. Is that correct?

A. My recollection is August 16th.

. . . . . .

[fol. 101] Q. Was that the first time you ever had a case where the special agent in charge had told you that someone had been in to see him?

A. No.

Q. You know that was common practice, wasn't it, that people would go to see the agent in charge and he would recommend them to the person who had the case in charge? Isn't that so?

A. I don't know how common it was; no.

The Court: Was it common or was it unusual?

The Witness: Outside of another case, this was the only other instance that had happened to me.

. . . . . .

ANDREW MULLENBACH, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

By Miss Goldman:

. . . . . .

Q. Was this the Gotham Beef Company?

A. It was the Gotham Beef Company, partnership, and Gotham Ship Purveyors, Incorporated, which succeeded the partnership.

Q. Did you also investigate any individuals?

A. I did.

Q. What individuals did you investigate?

A. Louis Berman and Philip Berman. They were the [fol. 102] owners of those businesses.

Q. How long did you carry on this investigation?

A. Well, I submitted a report, a final report, on my investigation in April, 1948. About two years.

Q. During those two years did you spend full time investigating these cases?

A. Oh, no.

Q. Well, about how much time did you spend investigating them?

A. I don't think I can estimate that, because we had other cases and other assignments.

Q. Well, would you say it was a substantial amount of time?

A. Yes, I would say that.

Q. What did you do in the course of your investigation? What sort of investigation did you make?

A. Well, it was circularization; checking of various customers of Gotham Beef and Gotham Ship to determine sales reflected on their records and on the records of the taxpayer.

Q. Did you go around to all the suppliers of Gotham Beef Company?

A. Well, in certain instances I wrote letters, visited them, or visited where there was a discrepancy in the amount of sales shown on the books and the amount of purchases shown by the customer from——

Q. As a result of this investigation did you make your findings?

A. I did.

Q. And what were they?

A. Well, I found that the sales of Gotham Beef Company and Gotham Ship Purveyors, Incorporated, had been in excess of those that were reported on the tax returns for those companies.

Q. How much in excess? Well, first, for what years were you investigating these companies?

A. Well, we were investigating 1942, 1943 and 1944.

Q. Well, for the years 1943 and 1944 how much did you [fol. 103] find in total unreported sales approximately?

A. Approximately the total unreported sales of Gotham Beef Company and Gotham Ship Purveyors in those two years was about $280,000.

Q. And did you attempt to find unreported purchases?

A. Yes, I did.

Q. And how did you go about that?

A. Well, we circularized, wrote letters or visited various suppliers of Gotham Beef and Gotham Ship Purveyors.

Q. Did you find unreported purchases?

A. I did.

Q. And approximately what was the total of the unreported purchases that you found for the years 1943 and 1944?

A. About $120,000 of purchases which were not on the books of either Gotham Beef or Gotham Ship.

Q. Now did you find some additional purchases provided by the taxpayer?

A. Yes, I did.

Q. And how much were those?

A. About $40,000 or $45,000 of additional purchases which were paid for by personal checks of Mr. Louis Berman. Those checks were submitted and we allowed them for that.

Q. What was the total of the unreported purchases you ultimately after investigation substantiated?

A. About $160,000.

Q. As compared with how much in unreported sales?

A. $280,000.

Q. Did you take any official action as a result of your findings?

A. I wrote a final report.

Q. Did you submit any recommendation?

A. In that report I recommended that Louis and Philip Berman be prosecuted for filing a fraudulent partnership return for the year 1943 and a fraudulent corporate return for the Gotham Ship Purveyors for the fiscal year ending March 31, 1944, and the fiscal year period ending [fol. 104] March 31, 1945, for the corporation; it was a short period that the corporation functioned in 1944; and against the individuals Louis and Philip for the years 1943 and 1944.

Q. Coming to the individuals again, had you found anything about them as a result of your investigation?

A. Yes. I found that they had made sales in their individual names which I included in the total of the business sales, the verified sales of either Gotham Beef or Gotham Ship.

Q. Did their return reflect the true income of the companies with which they were connected?

A. No.

Q. You said you recommended that the individuals be criminally prosecuted. At about what time did you make that recommendation, Mr. Mullenbach?

A. Yes. That was in my final report of the case that I submitted in April, 1948.

* * * * * * *

Q. At the time that you made your supplemental recommendation for criminal prosecution according to your computations and investigation, what was the total of the unreported sales for 1943 and 1944?

A. Well, the total was $280,000, but then there were these purchases which——

Q. And what was the total in purchases at that time, in substantiated purchases?

A. About $180,000.

Q. So that according to your estimate, there was $100,000 in difference between the sales and the purchases in unreported income?

A. Unreported sales, that is correct.

Q. After you submitted your supplemental recommenda- [fol. 105] tion of criminal prosecution, Mr. Mullenbach, did you hear anything further about the Gotham Beef case?

A. Yes, I heard that my recommendation had not been concurred with, had been reversed, that the case was being referred for non-prosecution.

Q. How did that information come to you?

A. I received an official notice in the office from the technical adviser to the effect that he had reversed my recommendation from prosecution.

Q. Mr. Mullenbach, between the time that you submitted your supplemental report recommending criminal prosecution—I believe you said it was in the middle of October?

A. In the middle of October or the third week in October 1948.

Q. —and the time you received the technical adviser's memorandum reversing your decision, were you notified that your decision was going to be reversed?

A. No, I wasn't.
Q. Were you notified that the taxpayers were so notified?
A. No, I wasn't.

* * * * * * *

ISADORE DAVIS, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. MacMahon:

* * * * * * *

Q. Now, was anyone else in the office in 1939?
A. Mr. Allan Hyman.
[fol. 106] Q. Whose names were on the door as of 1939?
A. Mr. Halperin, Mr. Hyman and mine.
Q. Did there come a time when Mr. Hyman withdrew from your office?
A. That is correct.
Q. When was that?
A. Some time prior to 1945.
Q. And did Mr. Halperin continue to have space in your office after that?
A. He did.
Q. Did you have any partner in the practice of law?
A. From the very commencement?
Q. Well, at any time?
A. Yes, I did.
Q. At those premises?
A. Nobody else—I had a nominal partnership with Mr. Halperin. We actually did not share fees. It was a partnership in name only.
Q. And when was that?
A. Prior to 1945, but only for a short while.
Q. About how long?
A. Perhaps a matter of months.
Q. Did there come a time when you formed the firm known as Schopick & Davis?
A. And Sherman.

Q. When was that?
A. In July 1945.
Q. Who were the partners in that firm?
A. Mr. Schopick, Mr. Sherman and myself.
Q. Did there come a time when Mr. Sherman withdrew from the partnership?
A. He did.
Q. When was that?
A. In 1947.
Q. Did Mr. Schopick continue on as your partner?
A. He did, sir.
Q. Did anyone else join the firm?
A. Well, Mr. Hoffman was associated with us from the very commencement; that is to say, July 1945.
Q. Was Mr. Hoffman a lawyer?
A. No, sir.
Q. Was he a certified public accountant?
A. I thought he was.
Q. Well, was he?
A. He is not, sir.
[fol. 107] Q. Now, when Mr. Hoffman came into the firm what was his special contribution to the firm? I don't mean in the way of capital; in the way of services or talent.
A. He said he believed he could obtain a substantial amount of OPA work. I think the OPA regulations were then in existence.
Q. Did he know people in any particular industry?
A. Yes.
Q. What?
A. Mostly in the lingerie trade and the garment trade.

* * * * * * *

Q. Did you say anything else with respect to Ninth Avenue?
A. I said that I heard the case was up there; I am sure that Mr. Steinberg would do what he could to help so long as the case remained at Ninth Avenue.

Mr. Rosenblum: May we get that date, please?
The Witness: Somewhere during July or August of 1947.

* * * * * * *

Q. Now, did you have any talk with your client?

A. We did. We told them about the fact that it had been reduced to $100,000 and that it was—it would have to be put up with Mr. Halperin. In a private discussion with the clients they asked about Mr. Halperin. I told them that they were not to be concerned, that he was entirely trustworthy, and that I could assure them nothing would [fol. 1687] be turned over until it was clear that there would be no prosecution.

Q. Did you tell them anything about the manner in which this money was to be raised?

A. In cash, and I said that they were not to sell any of the corporate or their own personal assets. I said, "You understand?" They said, "Yes, we do."

* * * * * * * *

Q. Now, who was in the room when Marks brought the money?

A. Mr. Hoffman and myself.

Q. What did you do with the money?

A. We turned it over to Mr. Halperin.

Q. Did you hear from Halperin after that?

A. Only that he had placed it in this box.

Q. He told you that?

A. Yes.

* * * * * * * *

Q. That is after you had this information from Mr. Saver about Bolich?

A. Yes, that is correct.

Q. Now, were you present on the premises from time to time with the agents?

A. I was.

Q. Who were these agents?

A. Mr. Clayton from the special agents' office and Mr. Scherm, revenue agent.

Q. Did you at any time disclose to those two agents the information that Mr. Saver had given you about Bolich's assurances of no-prosecution if they cooperated?

A. I told them nothing of the conversation that I had with Mr. Saver.

Q. Now, did you have a conversation with the taxpayers with respect to what they were to do when questions were [fol. 109] asked of them?

A. I said that there was very [*sic*] likelihood that the agents would speak to them without my being present, but that if they did, they ought to defer all questioning until I came; that I would speak with them.

Q. Was Mr. Saver on the premises of the Pattullo people during this audit at any time as far as you know?

A. I have no memory of him being present.

* * * * * * *

Q. Do you recall whether those affidavits contained any statement with respect to whether they could be used against the taxpayer?

A. Yes, they did.

Q. Up to that time had you told Mr. Clayton anything about the arrangement with Bolich or Saver?

A. I told him nothing of the conversation that Mr. Saver reported to me as having been had with Mr. Bolich.

* * * * * * *

Q. Mr. Davis, with respect to this check, dated November 10, 1948, did you have any conversation with Mr. Halperin prior to making delivery of this check for $2,500?

A. We did. Mr. Halperin said that he wanted some compensation at this stage of the game in the Pattullo Modes case, and we asked him how much, and either he suggested or we suggested that it be for $2,500, and we gave him a check for $2,500.

Q. Had Mr. Halperin done any legal work in the Pattullo case?

A. Other than the work that I have described.

Q. The check dated January 24, 1949 for $3,500, did you have any conversation with Halperin with respect to [fol. 110] that?

A. We did. Mr. Schopick and I spoke with Mr. Halperin, and Mr. Halperin said that he wanted further compensation in the Pattullo case, and we asked him how much, and I think he wanted something in excess of $3,500 and it was compromised at $3,500.

Q. What was this for?

A. Nothing other than for the work that he had done in the case as I have described it.

(Government's Exhibit 40 marked for identification).

Q. Mr. Davis, I show you Government's Exhibit 40 for identification and ask you to tell us what that is (handing).

A. This is a check for $200, dated August 24, 1948, made payable to the order of Max Halperin, which was given to him as reimbursement for expenses that he had in connection with his trips to Washington.

Q. In what case?

A. Either in the Pattullo case or the Gotham Beef Company case.

Q. Or both?

A. Or both possibly.

Mr. MacMahon: I offer it, your Honor.

Mr. Singer: I have no objection.

The Court: Received in evidence. Have it marked and then we will have it read to the jury.

(Government's Exhibit 40 for identification received in evidence.)

(Mr. MacMahon read Government's Exhibit 40 to the jury.)

Q. In connection with reimbursement for expenses in your office, how did you handle that?

A. Mr. Halperin told us how much money he had spent [fol. 111] on his trips to Washington, and we would reimburse him for them.

Q. Were any petty cash vouchers made?

A. I don't remember his ever having submitted any petty cash vouchers.

Q. Were any expense accounts made out?

A. I don't remember any being made out.

Q. Did you have any discussion with Halperin about compensation in the Gotham case at any time?

A. Yes.

(Government's Exhibit 41 marked for identification.)

Q. I show you Government's Exhibit 41 for identification, Mr. Davis, and ask you what that is (handing).

A. This is a check dated December 9, 1948, made payable to the order of Max Halperin for $1,760, which was the amount given to him in the Gotham Beef Company case.

. . . . . .

Q. Go ahead.

A. After talking to Mr. Scherm for a little while about the Pattullo case I said, "What is it you want?"

He said, "I think we are entitled to $50,000."

I said, "What for?"

He said, "I think we have been of real help."

I said, "How?"

Then he said, "Now, look here, take travel and entertainmment, for instance"——

Q. Don't go through all of that.

[fol. 112] The Court: Go ahead. Let us have the whole conversation.

Q. All right, go ahead.

The Court: Give us the whole conversation.

A. He said that the corporation had deducted X number of dollars in the various years for travel and entertainment, that he was proposing to make certain disallowances, that he could easily, because of lack of substantiation, increase those disallowances which would mean itself by reason of taxes, penalty and interest an amount in excess of the sum of $50,000. He pointed out some other items; I don't remember any more.

He also talked about the various accruals.

. . . . . .

Q. Now, did you have any further talks with your clients in the Pattullo case with respect to your own fee?

A. In May of 1949 I think we had—I think it was in May 1949—we had a meeting with Mr. Marks and Mr. Marks. Mr. Hoffman was present at our office at 535 Fifth Avenue and we settled the question of fees.

Q. You said with Mr. Marks and Mr. Marks, I believe.

A. Did I? I thought perhaps Mrs. Segel was there and simply emphasized that it was Mr. Marks.

Q. What was that conversation?

A. Well, we settled the question of the fees, and it was agreed on $50,000 to be paid in instalments of $10,000 apiece over a period of time.

Q. How much had you received in fees up to this time, about, to the best of your recollection?

A. Net roughly about $20,000, $25,000, maybe $30,000. [fol. 113] I can't be sure. We had disbursements against our fees.

* * * * * * *

Mr. MacMahon: I understand, but will you please listen for a moment. In that connection the Government has no intention of calling these taxpayers. We are informed that they planned to leave and go out of the country tomorrow.

The Court: You mean the Clover people?

Mr. MacMahon: Yes. Now in the event that the defendants wish to call them, and to avoid any charge that we didn't call them——

Mr. Aranow: That is too big hearted for the gentleman.

The Court: Go ahead, Mr. MacMahon.

Mr. MacMahon: We would like to be able at this time to state that they are in New York, that we will make their address available to them, and if necessary will serve subpoenas in their behalf.

* * * * * * *

Q. Mr. Davis, during the year 1950, did you do anything with respect to the Pattullo Modes case?

A. I worked with Scher & Roder on the preparation of process to the 30-day letter that had been sent.

Q. What is a 30-day letter?

A. A letter from the Treasury Department offering the taxpayer an opportunity to protest the findings made with respect to a taxpayer's tax liability.

[fol. 114] The Court; And stating that if they don't protest within 30 days the assessment——

The Witness: Will become final.

Q. Continue.

A. I worked with them and saw the protests when they were finally prepared and examined them.

Q. During what period of time was this?

A. Between the beginning of the year 1950 to about the middle part of 1950.

* * * * * * *

Cross-examination.

By Mr. Singer:

* * * * * * *

Q. So that in so far as the false affidavit was concerned, you would say Mr. Schwaeber didn't know that it was false?

A. I would say that he didn't know. So far as I know, he didn't know.

Q. So far as you know?

A. No.

Q. It was you who conceived the idea?

A. I would say that it was me who conceived the idea after having had a talk with Mr. Schwaeber such as I have described?

A. It was you who conceived the plan of having Smith tell the lie. Is that right?

A. That is right.

Q. You kept saying that whenever you discussed this matter, you discussed it as having no merits whatever, the Pattullo case?

A. That the Pattullo case had no merits. After the audit was finished, I felt sure there were no merits to the case.

* * * * * * *

[fol. 115] Q. The only difference being, Mr. Davis, that here you are before a judge and a jury, is that right?

A. That is right.

Q. And another important difference is that here you have already pleaded guilty, isn't that right?

A. I pleaded guilty, yes.

Q. And here again the other important difference is that you have been indicted for an income tax violation as well as for this charge of, whatever it was, conspiracy, is that right?

A. These are new events that took place.

Q. These are new events that took place?

A. Yes.

The Court: Let me understand: Are you now under indictment for an income tax violation?

The Witness: Yes.

The Court: That you haven't pleaded guilty to?

The Witness: Of course not.

The Court: That was a new thought I wanted to get clear.

Q. That income tax violation, you said—I am not sure, I want to apologize—my hearing may not extend to that whisper—you said you didn't plead guilty to that income tax violation?

A. That is right, I didn't plead guilty.

Q. I think you used the words "Of course not."

A. Yes.

Q. Which would indicate—I don't want to be short-circuited off the subject, but I would like to finish it anyway—that this income tax violation for which you were indicted was an indictment returned in April of last year?

A. That is correct.

Q. There was an indictment which charged in substance [fol. 116] that you and Mr. Schopick had filed a false partnership return. Do you remember that?

A. Yes, I do.

Q. And also that you personally had—let us see; this income tax violation or indictment covered the fiscal year ending January 31, 1949, am I correct?

A. Yes, you are correct.

Q. And you had alleged an income, total partnership income from January 1948 to January 1949 of $36,803, is that right?

A. Approximately.

Q. While in truth and in fact, as the indictment alleges, you had a gross income of $196,000?

A. That is what the indictment alleged, a difference of $160,000.

Q. Now, I am going to come to that.

I assume that the difference as charged in the indictment was the alleged $100,000 in currency paid in the

Pattullo matter and the alleged $60,000 in currency paid in the Gotham matter, is that right?

A. That is right.

* * * * * * *

Q. That indictment had four points, did it not, which charged you and Schopick together with filing a false and fraudulent partnership return, is that right?

A. That is right.

Q. It also in one count charged you personally with filing a false income tax return?

A. For the same——

Q. For the same purpose. And it also charged in the fourth and last count you and Schopick together with a conspiracy to make this false and fraudulent tax return, to evade payment of taxes individually, is that correct?

A. Approximately. I don't have the indictment in front of me.

Q. Well, you have read the indictment?

A. Yes, I did.

The Court: Well, if you want to show it to him.

[fol. 117] Q. You don't remember it too well?

A. I said I don't remember it too well, the language of it or what each count alleged.

Q. As long as we are on the subject of the indictment, let us go to the second indictment. That was an indictment that was filed in June of last year, was it not?

A. I think later.

Q. That is the one to which you pleaded guilty to only one count?

A. That is correct.

Q. However, in that indictment, which incidentally for the record bears the number 144-285—that indictment had a second count which charged you with aiding in the making of this false affidavit by Smith.

The Court: Is that so? Do you know?

The Witness: If you say, if you are reading from it and that is what it says, that is what it says.

Q. But you don't remember?

A. I don't remember, no.

Q. You didn't read that statement?

A. I read it.

Q. Now, the third count—well, incidentally, you were guilty of that count, weren't you?

A. I think there is an allegation essentially to the same effect in the conspiracy count to which I pleaded guilty, because there is a statement in there that we people indicted impeded and obstructed justice and told people what to say, et cetera.

Q. No. I am asking——

A. Yes, I think there is a statement there about submitting a false affidavit to the Treasury Department.

Q. You were guilty of that count, were you not, that you had prepared this false affidavit?

A. If the affidavit is referred to in that second count and I am charged with a crime, an offense based upon being a party to a plan to submit a false affidavit, then I [fol. 118] was guilty of that count.

Q. But you didn't plead guilty?

A. I didn't plead guilty.

Q. And you know, do you not, as a lawyer that if you didn't plead guilty to a count you can't be punished under that count, isn't that right?

A. If I don't plead guilty, that is right.

The Court: Is that a substantive count, Mr. Singer?

Mr. Singer: That is a substantive count I have read, and for the record it charges a violation of 26 U. S. Code, 3793(b).

The Court: Does the conspiracy count take in that substantive count, too?

Mr. Singer: It doesn't take in the substantive count. It speaks of the acts.

The Court: It speaks of the acts?

Mr. Singer: Yes.

Q. Now, you know, do you not, if you pleaded guilty to Count 2 you would have been liable to a jail sentence under that count?

A. If I pleaded guilty would I be liable to it? Yes.

The Court: On the first count you pleaded guilty to you are also liable?

The Witness: Yes.

Q. Then you would have been liable to punishment on

the first count, and then at the discretion of the Court, to punishment on the second count, isn't that so?

A. I assume so. I don't know how——

[fol. 119] Q. And then there was a third count which charged you with subornation of perjury with respect to Mr. Smith's testimony before a committee. You didn't plead guilty to that, did you?

A. I didn't plead guilty. Here again there is an allegation in the conspiracy count which is broad enough to include an act such as you have described.

Q. You knew, did you not, when you didn't plead guilty to that count you couldn't be sentenced to jail under it?

A. That is right.

Q. Now, there is an allegation in the fourth count, the fourth, fifth, sixth, seventh and eighth counts, each of which charges separate crime under Title 18, U. S. Code, Section 503, 5 and 2, for corruptly endeavoring to influence or obstruct or impede the due administration of justice with respect to certain witnesses and you didn't plead guilty to those?

A. I didn't plead guilty to those counts.

Q. So you know now that although this first count of this first indictment contains eight counts, you only pleaded to one count and therefore you could only be sentenced to jail on one count?

A. That is right.

Mr. MacMahon: Your Honor, I submit that the remaining counts are still outstanding and can be tried as a matter of law.

The Court: That is correct.

Q. Let me understand it. Do you intend to tell this Court and jury that such is the contemplation of the Government?

The Court: Whether it is the contemplation or not, it is a matter of law that they are still outstanding.

[fol. 120] Mr. Singer: If they are he can say so.

The Court: I don't think it is for Mr. MacMahon to decide.

Mr. Singer: I don't think he should have made the statement and I respectfully ask that it be stricken from the record.

Mr. MacMahon: I think Mr. Singer was misstating the fact of his question.

The Court: The indictment still stands, and the count.

Q. Now, while we are on that subject, do you expect to be tried on those other seven counts?

A. Do I expect to——

Q. Yes.

A. I don't know.

Q. You had no discussion about that at all?

A. I told you the discussion that I had with my lawyer.

Q. Only, I am speaking, not about any other subject, but the subject of these seven counts?

A. I have no way of knowing.

Q. So you honestly say to me that you expect to be tried on those seven counts?

A. I hope that I won't be but I certainly have no way of knowing.

Q. And you expect do you not therefore to be tried on the income tax violation?

A. I hope I certainly will not be.

Q. And that is three counts involving you?

A. Yes, three counts.

Q. Now, while we are on the subject of punishment, do you know what the punishment is for any of these counts, any one of them?

A. I don't know.

Q. Don't you know that for a violation of the Internal Revenue laws, filing a false return, the punishment is five years?

A. I think so.

[fol. 121] Mr. MacMahon: Your Honor, I object to the question on two grounds: One we are arguing law with the witness which I don't think is proper; and two, I think matters are being brought before the jury which are properly before the Court only.

The Court: I will allow it, if the witness knows. Up to five years, is that correct?

The Witness: Yes.

Q. So by not pleading to those ten counts, seven in the second indictment and three in the income tax indictment

you have thus far put yourself in the position where you will have avoided 50 years of punishment?

The Court: Objection sustained as to that.

By Mr. Singer:

Q. Still on that very subject we were discussing before recess, you know that under the law of the State of New York, the crime of conspiracy is a misdemeanor, do you not?

A. I think I do.

Q. You do?

A. Yes, I believe so.

Q. You know, in response to his Honor's question yesterday, you said you were still a lawyer, although you were not practicing law. Is that right?

Q. You know, do you not, that you cannot be automatically disbarred as a lawyer in the State of New York unless the conviction is of a felony, according to the laws [fol. 122] of the State of New York?

A. I tell you that I haven't studied that situation apparently as well as you have.

Q. You are not familiar with that?

A. That the conspiracy to which I pleaded guilty here would be a conspiracy——

Q. Is a misdemeanor.

The Court: Instruct me on this, Mr. Singer. It is a felony under the Federal law?

Mr. Singer: And it is a *d*isdemeanor under the State law.

Mr. McMahon: I submit again that is an erroneous conclusion of law, and I don't think it proper to argue law with this witness.

The Court: The witness says he does not know the law on disbarment.

Mr. McMahon: We are here to get facts. I submit the law is for the Court and not for the witness. This entire line is improper, I submit.

The Court: You agree it was a felony under the Federal law, Mr. Singer. I am seeking information now.

Mr. Singer: I agree completely, and I continue to say, your Honor, I may respectfully say——

The Court: The witness says he does not know what the situation is.

Mr. Singer: That is one of the things which I am entitled to inquire about with respect to his interest.

The Court: Go ahead, you may inquire.

Mr. Singer: I have asked him. He says he doesn't know.

[fol. 123] By Mr. Singer:

Q. Do you know that you cannot be automatically disbarred from practicing in the State of New York unless you plead to a crime which is a felony under the laws of the State of New York?

A. I don't know.

Q. You never heard of that?

A. I may have heard of it, but I don't know. I have no memory of ever having heard it.

Q. It never entered your mind when you entered the plea specifically to the conspiracy count of the indictment that thus you would avoid automatic disbarment?

A. It did not.

Q. Let us go on further. You haven't resigned from the bar since you pleaded guilty?

A. I have not.

* * * * * * * *

Q. Anyway, during all of 1947, there was no power of attorney filed by your firm for the Pattullo Modes people. Isn't that right?

A. That is correct.

Q. So that there would be no record anywhere in any department that you represented this firm. Isn't that right?

A. I don't think there was any record that we represented the firm in 1947.

Q. As a matter of fact, in 1948 in January, you personally, nor any member of your firm, didn't appear when Mr. Saver and Mr. Smith went to Mr. Wheeler?

A. We did not appear.

Q. So that even as late as January, 1948 on the record, [fol. 124] in so far as it existed in the Treasury Department, your firm's name didn't appear?

A. That is correct, I think.

* * * * * * *

Q. Yes. Tell me, don't you remember sending Schopick over to Jerris with some books to keep for you for a short period of time?

A. No.

Q. You would say that such a thing did not happen?

A. I have no memory of it happening.

Q. I notice you say you have no memory. Does it refresh your recollection on that subject of this missing book at all—does an incident like this refresh your recollection that you sent Schopick or you went yourself or somebody did, that you knew about it, to take the books over to some firm where they were first kept and then later those books were brought over to the Standard Aromatics Company?

A. I think that after the grand jury investigation started in Brooklyn, all of the records which we had submitted for inspection by the revenue agents, which included all of our canceled vouchers, which included invoices sent to our various clients, which included the general ledger, which supplied a great deal of information, was kept for a short while, maybe a day or two, at Standard Aromatics. I believe that that is what happened.

Q. Who brought them over there?

A. I think I may have brought it over.

Q. Then you got them back?

A. That is correct.

Q. So that when these men came in to look at your books, your cash book was missing?

A. Long before then.

[fol. 125] Q. But when they were there, it was not there?

A. When they were there it was not there.

Q. And the only things that these men from the Treasury Department could check with respect to receipts was this check book in which you say you had entered all the checks you had deposited?

A. No, the check stub book wasn't there either.

Q. So that they didn't even have the check book in which the entries were made?

A. Yes, but what we did——

Q. Now, wait a minute. What they then had was the bank statements, which would show total deposits?

A. That is correct, individual deposits for each day.

Q. Yes, individual deposits.

A. Right.

Q. So that the reconciliation between your income tax return for any period would have to have been made on the basis of this bank statement which showed individual daily deposits, or whenever these deposits were?

A. Plus identification by us of I should think roughly 95 per cent of the receipts, and this is only a guess but I think we were very high.

Q. Out of the $36,000 which you say you got between January 1947 and 1948, you roughly identified the source of 95 per cent of the $36,000?

A. I think so.

Q. The vouchers themselves, they were not lost?

A. They weren't lost.

Q. Because they represented the payments to the individuals or the corporations or firms for the services or whatever the expenses were?

A. That is correct.

Q. But the notations on the check stub book, they were not available for inspection by the Internal Revenue Department?

A. Except our identification was of the client, and I think that in almost all instances, perhaps 95 per cent—I can't [fol. 126] be sure now; it is some time—we showed them the invoices and other data indicating the clients and the nature of the work done.

Q. Speaking of invoices, were all the invoices for all clients kept in one central file?

A. No.

Q. Or was the invoice kept in each file?

A. I think in one file. I am not sure. Perhaps there was one file which had the invoices and duplicates in the individual files.

Q. Did you show them all of the invoices in this file?

A. So far as I know.

Q. So far as you know, did you make any deposits in currency for the firm, or did anybody else make it on your behalf for the firm?

A. Not that I remember.

Q. All of your fees were completely by check?

A. That is correct, to the best of my recollection.

Q. Tell me, and I don't want to bring up this subject, but since we are speaking of currency, Mr. Corbin and you had discussed some wife trouble. I am not interested in that detail, but wasn't there a claim made in that wife trouble that there was $125,000 in cash in your box which you had taken out? Isn't that right?

A. She claimed that.

Q. She did?

A. She didn't claim it was taken from the box. She said she handed it to me.

Q. She said you had $125,000 in cash in 1950 or 1951, 1952? I don't know when it was. Isn't that right?

A. After the newspaper's report carried the story that this money was supposed to have been given to me and to Hoffman.

Q. Whenever it was, there was a time, and you knew it, and that was after you had gone to the box and [fol. 127] switched boxes, wasn't it? That was after you had closed the box?

The Court: What was after?

Mr. Singer: This statement of the $125,000 in cash.

The Court: When was that statement made by your wife——

The Witness: Some time in 1953, I think it was.

The Court: Was it made in a formal document or anything like that?

The Witness: In a formal document.

The Court: All right.

Q. And your wife said too, did she not, that this money had been in the box, this box that you told Mr. Corbin yesterday had only $2,000 in it?

A. That is right.

Q. And your wife said further, didn't she, that this box of yours was in her name and your name as joint tenants?

A. That is right.

Q. And she said also that you had rushed up there and cleaned the money out of the box?

A. I don't know that she said that.

Q. She didn't say it?

A. No, I don't——

Q. She said, in any event, that some time in 1952 she had given you $125,000 that belonged to you and it was in currency. Isn't that right?

A. She said that some time in 1953——

Q. I don't care if she said it yesterday.

Mr. MacMahon: May the witness answer the question?

[fol. 128] The Court: Yes, answer that question.

A. Possibly at some time in 1953.

The Court: What did she say?

The Witness: She said there was $122,000 that she handed to me.

Q. That was in the box?

A. She did not say it was in the box because it wasn't in the box because there was no such money.

Q. Did she say where she had gotten it?

A. She said I had given it to her.

Q. To hold?

A. To hold.

Q. And it was currency?

A. And it was currency.

Q. That is right.

A. And it was currency, and it was the money that we took out of our banks.

Q. And it was a lie that there was $125,000?

A. It was a lie and she has said that it was a lie.

Q. Just your wife was piqued at you and made the charge?

A. That is right.

Q. You have never had any assessment filed against you by the Internal Revenue Department in connection with your income tax returns for 1949?

A. No.

Q. Did the fact that you wanted to avoid any possible assessment by the Internal Revenue Department of taxes due from you have anything to do with your plea of guilty

and your offer to cooperate and testify for the Government?

A. No.

Q. The avoidance of tax prosecution or the payment of taxes due played no part in your decision to cooperate and to testify?

A. That is correct.

Q. Nothing whatever?

A. Nothing whatever.

* * * * * * *

[fol. 129] Q. As I understand it, your claim is that because you didn't receive it for yourself, therefore, it wasn't income to you that you had to explain?

A. We didn't have to include in our return.

Q. I mean that was again on the same theory on which you generally viewed your tax return. Whatever you paid out to anybody else wasn't part of your gross receipts?

A. No, this is rather different. This was never intended for us, intended for somebody else, and hence it should not have been any part of our gross receipts figure.

Q. And the Government's theory in their indictment that it was receipts to you was entirely erroneous?

A. It is.

Q. The $100,000 didn't belong to you at all? A. That is correct.

Q. You had no interest in it whatever except that whatever you paid for should be done and complete?

A. That is correct.

Q. And you had no obligation with respect to the $100,000 except to get it and to turn it over, as you have testified to here, to Mr. Halperin?

A. That is correct.

Q. Now, we are sure about that up to this point, aren't we?

A. That is correct.

Q. There isn't any question about it?

A. No.

Q. What Mr. Halperin did with it, if and when he received it and after you got your results, made no difference to you whatever, did it?

A. Only that I would have wanted that it be turned over to the person for whom it was ultimately intended.

Q. You were interested in seeing to that?

A. Not me principally; Mr. Halperin principally.

[fol. 130] Q. Well, Mr. Halperin was the one you say that had the $100,000?

A. That is correct.

Q. He was the one apparently who was entrusted with it?

A. That is correct.

Q. And it was all over; the result had been accomplished now and Halperin had the $100,000?

A. That is correct.

Q. And I think you have agreed with me just a moment ago that you had no further interest in it whatever?

A. That is correct.

Q. However, you added—just a moment, so that you and I feel at least that I deal fairly with you—you said that you had some interest in making sure that Halperin gave the money to the person who was supposed to get it?

A. I said that I would have wanted that he do so.

Q. That means that you had an interest?

A. To that extent, yes.

Q. But that was the only interest.

A. That is correct.

Q. If I remember your testimony correctly, the whole clan gathered together in January of 1949—and by clan I mean you, Schopick, your associate lawyer and CPA friend Hoffman, and Mr. Halperin—and you all went over to the Chemical Bank. Is that right?

A. That is correct.

Q. And you had a meeting down there in this big room that was assigned to you over money in which you had no financial interest?

A. That is correct.

Q. In money for which whatever result you claim was supposed to be accomplished had already been accomplished and finished. Isn't that right?

A. It had been accomplished.

Q. And all of you got together and you held a meeting with the money?

A. We didn't hold a meeting. We went there for the [fol. 131] purpose of counting, taking it out, and getting it started on its way.

Q. And all of you started to count the money in which you were going to get no part?

A. That is right.

Q. Incidentally, this wasn't a part of that $125,000 that you told us about this morning?

The Court: Which $125,000?

Mr. Singer: $122,000.

Mr. MacMahon: Your Honor, same objection. There has been no such testimony whatever. Mr. Singer has been testifying in his questions, but that I don't believe to be testimony.

The Court: I don't know what you mean by that, Mr. Singer. Better identify it a little more.

Q. You testified this morning that somebody made a claim he had given you $122,000.

Mr. MacMahon: I submit that is pure hearsay coming from the mouth of Mr. Singer and objectionable.

Mr. Singer: If that is hearsay from my mouth——

The Court: The witness testified his wife had made some such claim apparently against him. Whether true or not, of course, the witness denies it is true. Therefore, it is not accepted as true. It would be hearsay.

He has said such a claim was made. I think you are asking him whether she claimed that $120,000——

Mr. Singer: Was included in this $100,000.

The Court: Did it have anything to do with it?

The Witness: Let me answer, if you please.

[fol. 132] Q. Surely, answer it.

A. She certainly would not say that this $100,000 is any part of the fanciful figure of $122,000 you can be sure.

Q. What do you say about it personally?

A. I say that the $100,000 was in Mr. Halperin's possession, and that it was counted, and that it went on its way, just as I have described it in my testimony.

Q. And you swear to that under oath.

A. I swear to that under oath.

Q. Under the same oath you made in other places where you told lies?

The Court: Whether it was the same oath or not, he has admitted he swore falsely.

Mr. Singer: That is right.

Q. How much of this $100,000 did you personally take, your take?

A. How much of this $100,000——

Q. For yourself.

A. Nothing.

Q. Not one thin dime?

A. Not one thin dime.

* * * * * * *

Q. Would you say that you and Hoffman and Schopick all agreed upon the details of what you people say occurred at the bank that day?

A. Did we agree then on the details?

Q. Yes.

A. We did not agree on the details. We recalled the details.

Q. You recalled it to each other?

A. No, there was very little recalling. We knew the facts.

Q. You all remembered it, but get [*sic*] you all stated it?

A. Not all of the facts.

[fol. 133] Just some of them?

A. Maybe some of them.

Q. But certainly the fact that each one of you counted part of the money?

A. No, I think not.

Q. That you are not sure of?

A. I think that we did not discuss it.

Q. You just think that. You are not sure of whether you discussed that or not?

A. I am pretty sure that we did not discuss it.

Q. You are positive. You discussed that you went downstairs and Halperin took his box out and got a big room, where you all sat down with this box?

A. I think the only reference we made at all to that

incident and event was this room that we had gone to, how big a room it was.

Q. That you discussed?

A. I think that was the only incident.

Q. What was there, a difference of opinion on whether the room was large enough to crowd the four of you into it?

A. No, there was no difference of opinion.

Q. Did you ever go back there to this bank, the Chemical Bank, in the last few months or the last year to see this room, to identify it?

A. I did not.

Q. So far as you know, do you know whether such a room exists today?

A. The Chemical Bank has changed—it hasn't moved its quarters, but they have done some alteration work.

Q. I see. How do you know that?

A. I am a depositor in the bank. I have been.

Q. And you have a box in that bank?

A. I have not.

Q. Then you know that they changed the quarters where the rooms are?

A. I didn't say that they had in fact changed. You asked me whether it is still there, and I am thinking of the possibilities that because they made substantial alterations, [fol. 134] they may have done something with respect to the vault department.

Q. You mean there may not be such a room?

A. I don't know.

Q. Tell me: Have you ever seen an entry record in the Chemical Bank showing Mr. Halperin went or had access to a vault on any day in January 1949?

A. Have I seen an entry record?

Q. Yes.

A. I have not.

Q. Or an access record. You understand what I mean?

A. I understand what you mean. I don't know whether they keep such records.

The Court: You have never seen one, in any event?

The Witness: I have never seen one, in any event.

Q. Now, as a matter of fact the taxes of Pattullo Modes were still under discussion in December of 1950. They had not yet been——

A. December 1950?

Q. —had not been yet determined?

A. I don't know that it was. I think that the conference in which an understanding was reached with respect to the corporation's tax liability had occurred some time in August 1950.

Q. Well, by August 1950 was this decision acquiesced in or not?

A. I don't know.

Q. Apparently the whole——

A. I don't think so. I am not sure.

Q. The whole thing dropped right out of the picture. [fol. 135] It wasn't even considered later?

A. Oh, no, sir. It was considered later.

* * * * * * *

Cross-examination.

By Mr. Gottesman:

* * * * * * *

Q. When was this question of giving money first broached to you after January 10th?

A. Some time in the month of February or March, Mr. Hoffman and I rode in Mr. Hoffman's car to pick up Mr. Steinberg at 341 Ninth Avenue. We picked him up at 341 Ninth Avenue and we went to his home, and we spent a little while there, and after our brief visit, Mr. Hoffman told me that he had asked Mr. Steinberg what he wanted in the Pattullo Modes case and that Mr. Steinberg said to him, "Settle it with the agent."

Q. Did you discuss it with Mr. Hoffman at that time?

A. The discussion is as I have described it.

Q. Mr. Hoffman told you——

A. He said and that therefore it would have to be settled with the agent.

Q. Did you hear this conversation or did Mr. Hoffman relate it to you?

A. He related it to me.

Q. When Mr. Hoffman related this to you, did you ask him any questions with reference to it?

A. No, not that I can remember at this time.

Q. You mean you just took the statement and took it for granted that money should be paid?

A. I took it for granted that there would be a follow-up and follow-through.

[fol. 136] Q. A follow-up and a follow-through on what?

A. Asking for the money specifically.

Q. For what purpose?

A. For the fact that they had been responsible, or one of them had been responsible, in sending the case to us or getting the case for us, and I expected that some claim would be made that they were instrumental or that Mr. Scherm was instrumental in helping us effect a tax saving.

Q. So, in other words, there were two purposes. Is that it?

A. As to why I thought that he wanted that much money?

Q. That is right.

A. I was told it was for both those purposes.

Q. Who told you that?

A. Mr. Scherm.

Q. That was for both purposes?

A. No. Mr. Scherm told me he helped in the case. He made no reference to the fact that the case had come to us through Mr. Steinberg.

Q. Mr. Scherm made no reference except that he helped you in the case? When did he make this reference, Mr. Davis?

A. On a visit to the office.

Q. When?

A. As I say, in April or May.

Q. Well, how long after this alleged visit to Mr. Steinberg did this conversation come up?

A. This alleged visit, you say?

Q. Well, this visit.

A. I think about a month or two.

Q. A month or two?

A. A month, I think; maybe less, maybe a little bit more.

Q. When did you take it up with the client?

A. After Mr. Scherm came to our office.

Q. When did you visit the client and speak about this matter?

A. Oh, perhaps the very same day that Mr. Scherm was [fol. 137] in our office discussing the amount or maybe the next day.

Q. What month?

A. I repeat again, I am not sure. I think it was the month of April or May, 1949.

Q. Now April or May?

A. It has been April or May for sometime now in my testimony—or March.

Q. Or March?

A. Yes. I said I didn't know specifically when it happened.

Q. What did you tell the taxpayer and what did the taxpayer tell you? I will withdraw that. Let us place it. Where did this conversation with the taxpayer take place?

A. At the office of Pattullo Modes. When I say the office I don't mean the bookkeeping office; I refer to the small room opening off the showroom.

Q. What did you say to them and what did they say to you?

A. I told Mr. Marks that Mr. Scherm had come in to see us; he first asked for $50,000, perhaps a little bit more; I don't remember now; and he said that he had helped us very considerably in the—that he had helped us and could help us more in the civil aspects in assessing and computing the tax liability. I told them that he had made reference to a number of items. I told them that he said that he could make much more substantial disallowances, and these other disallowances in taxes, penalties and interest would easily exceed by several times the amount that he was asking for, and that he could make these disallowances because of a lack of substantiation of these expense items, and I also told them that he claimed he was of assistance to us in setting up accruals with respect to Jo Copeland. I told the clients I had disputed some of the things or most of the things he had said, and that he hadn't helped us or [fol. 138] couldn't possibly help us with respect to the

accruals, that I had said to him that the amount was exorbitant; excessive, and outrageous, and I said that he had finally reduced it, and I thought that was the best that could be done with it, and they shared my opinion and they asked me whether that would be the end of it, and I said it was and would be, and they agreed to do it.

Q. You said once that Scherm said he had helped you. Now, how had Scherm helped you up to this time?

A. I said to the client that he had helped us—I said that Mr. Scherm claimed that he had helped us.

Q. Yes. Now, had he helped you in any way up to this time?

A. Well, depending entirely upon what steps he had already taken in the processing of the case. It may well be in his opinion he had helped us with respect to the accruals: He had filed certain memoranda or taken certain positions. I don't think his report, I am quite sure his report was not finished in the case. Therefore he was in a position to make much more substantial disallowances than he was proposing to make.

Q. You further told the client, is that correct, that you felt that he could tax you several times what he was asking, this figure of over $50,000?

A. That is what he said.

Q. You had some knowledge of tax matters, didn't you?

A. I had some knowledge.

Q. Well, did you agree with that or disagree with that, or did you make any comment with reference to that?

A. To the clients?

Q. Yes.

A. I believe that I said to them that if he wanted to, he could simply write down large disallowances, yes.

Q. That figure, you said, I believe, would be several [fol. 139] times, that the tax saving would be approximately $100,000 to $150,000?

A. I think he made a calculation that it came that high.

Q. That high?

A. Yes.

Q. And you want this jury to understand that your fee out of the Beef case, in which you told us about $60,000. figures and other items, was about $1200?

A. I want the jury also to understand we were supposed to get additional fees in the Gotham Beef Company case, that I thought would amount to a very substantial amount of money; that we did submit a bill for $1500, as a matter of fact, which was only to be a portion I thought of the ultimate fees that would be paid in the Gotham Beef Company case.

* * * * * * *

Q. Do you think, Mr. Davis, that they just disregarded your instructions to them without regard?

A. I am not sure that I gave them any instructions, but the first time I knew about their continuing to make off-the-record sales was a long time after.

Q. At what point was that?

A. Maybe in 1951 or 1952.

Q. 1951 or 1952?

A. That is right.

Q. When in 1951 and under what circumstances did you learn of that for the first time?

A. Perhaps as a result of a talk that I had with them in July of 1951 or anywheres between July——

[fol. 140] Q. This is conjecture; you don't have any recollection?

A. No, I don't have any precise knowledge of when I first learned they continued to make off-the-record sales.

* * * * * * * *

By Mr. Rosenblum:

* * * * * * *

Q. I think you said yesterday when Mr. Singer brought to your attention the matter of the indictment on your income taxes which charged—that is the indictment, as I recall the testimony, which charged that you made, you reported this $36,000-item and paid taxes on $21,000, but in fact you should have reported $196,000. Do you recall that?

A. Yes.

Q. You said you wouldn't plead guilty to that because the other $160,000 wasn't money you personally kept, is that right?

A. That is right.

Q. Those two figures of $160,000. You knew by that time that Pattullo Modes was at least testifying or cooperating with the Government?

A. I knew by that time when we were indicted in April?

Q. Yes.

A. That they were cooperating with the Government, yes.

Q. Is that right?

A. Yes.

Q. And you say you received cash from Pattullo Modes of $60,000 and $100,000?

A. Not from Pattullo—sixty.

Q. I didn't mean that. You received cash in two cases?

A. Yes.

[fol. 141] Q. $100,000 from Pattullo Modes and $60,000 from the Gotham people?

A. That is right.

Q. Is that right?

A. Yes, that is right.

Q. Now, you say that the $196,000 gross income figure was not a correct figure because that wasn't your gross income?

A. That is correct.

Q. And that included $100,000 you say you turned over to others?

A. Yes.

Q. And the $60,000 in the Beef case.

A. Yes.

Q. And you knew that by that time the Pattullo Modes people were cooperating with the Government?

A. I knew that, yes.

Q. And you knew that the source of the money that came from Pattullo Modes was $100,000, and from the Beef people the $60,000?

A. I knew that $100,000 was with reference to Pattullo Modes.

Q. And they knew about it?

A. Yes.

Q. And they charged you in that year with $160,000 which you say you received in cash, right?

A. That is right.

Q. But you didn't keep it; you turned it over?

A. Yes.

Q. Tell us why the Pattullo people didn't give the figure of $40,000 to the Government if the same source gave the $100,000 figure, and you say you got $40,000 in addition to the $100,000.

* * * * * * *

Re-cross-examination.

By Mr. Singer:

* * * * * * *

[fol. 142] Q. That represented your earnings from the time you started to practice law, and the savings of your wife. Isn't that right?

A. That is right.

Q. And any inheritances or gifts you may have obtained. Isn't that right?

A. That is right.

Q. And this was cash money you had in bank accounts, stocks that you had purchased, and while we are on the subject, did you ever give the Government any net worth statements of your own for the years 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954?

A. I didn't give them a net worth statement.

Q. There has never been any verification by any official source of the amount of money you had or expended in any particular year to show whether there was an increase or a decrease in your net worth. Is that right?

A. I don't know what verification they made.

Q. You know the purpose of a net worth statement?

A. I say I wasn't asked and I didn't give any.

Q. And you have never given it?

A. That is right.

* * * * * * *

STIPULATION OF FACTS

Mr. O'Hara: It is hereby stipulated and agreed by and between counsel.

1. That on February 18, 1952, a grand jury of the United States District Court of the Eastern District of New York was duly impaneled. That said grand jury (popularly referred to as the Brooklyn Grand Jury) instituted an inquiry and investigation into possible violations of the Internal Revenue Laws of the United States and into possible violations of law in the administration [fol. 143] and enforcement of the Internal Revenue Laws and in the administration of the affairs of the Bureau of Internal Revenue and the Internal Revenue Service in the Eastern District of New York. Said inquiry and investigation continued until February 24, 1953, when the grand jury was duly discharged by the Court.

2. That during the period from February 2, 1951, to October 30, 1953, the Committee on Ways and Means of the United States House of Representatives, acting by and through its duly organized and authorized sub-committee on administration of the Internal Revenue Laws, a competent tribunal, was duly conducting an inquiry and investigation for the purpose of determining whether or not the safeguards concerning the selection, promotion and conduct in office of officials charged by law with the duty of administering the Internal Revenue Laws were adequate to insure honest, competent and undivided service. The Sub Committee has been popularly known and referred to as the "King Committee" with respect to its activities during the period January 13, 1951, until January 14, 1953, under the chairmanship of Representative Cecil R. King, and has been popularly known and referred to as the Kean Committee with respect to its activities during the period January 15, 1953, to October 30, 1953, under the chairmanship of Representative Robert W. Kean.

The Court: That stipulation is accepted by all counsel for defense.

[fol. 144] VINCENT J. CLAYTON, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination.

By Mr. MacMahon:

* * * * * * *

Q. But, in any event, it was not referred to your office until February, 1948. Is that right?

A. That is correct.

Q. And Scherm did not refer to you at any earlier time?

A. No, sir.

Q. On your initial step in the investigation of the Loehmann's records, did you come to any conclusion at that time with respect to the merits of this case for criminal prosecution?

A. Yes, sir. It appeared to me that I had a prima facie case on that information alone.

Q. Did you receive any other information at or about the time of this status report from anyone in your office with respect to this investigation?

A. Yes, sir, the next communication I had was also from Mr. Dowling. He came in and verbally advised me that he had been told by Mr. Bolich that I was not to communicate with third parties, that the taxpayers were going to cooperate with the Government and make available the information revolving around the attempted evasion of income taxes.

Q. About when did you receive those instructions?

A. Very shortly after I submitted that memorandum, still in August of 1948.

* * * * * * *

Q. I notice, Mr. Clayton, that these statements, Government's Exhibits 53, 54 and 55 are all dated January 4, 1949. Up to that time had you been advised by anyone [fol. 145] that any governmental official or anyone in the Internal Revenue Bureau had made any commitment not to prosecute the Pattullo tax case?

A. No, sir.

* * * * * * *

Q. Now, did you at the time of these statements advise the Pattullo taxpayers of their constitutional right not to submit any incriminating information?

A. Yes, sir.

Q. And they nevertheless did submit such information to you?

A. Yes, sir.

Q. And did you consider that incriminating?

A. Yes, sir.

Q. Was it your intention in taking these statements to use them for just that purpose?

A. It was my intention to use them as exhibits in a report in which I would recommend criminal prosecution.

Q. Now, on January 4th had anyone else in the Internal Revenue Bureau seen these statements?

A. Mr. Recchia, Special Agent Recchia, was present with me at the time we took the statements.

Q. Had you shown them yet to Mr. Baradell?

A. No.

Q. Had you shown them to Mr. Bolich?

A. No, sir.

Q. And at the time these statements were given was Davis present in your office?

A. My recollection is that he was present during the interrogation of each of the taxpayers.

Q. Now, was Saver there?

A. No, sir.

. . . . . .

Q. Mr. Clayton, at that date, January 5, 1949, had you submitted any other information to Mr. Bolich directly [fol. 146] other than the status report which you submitted to him, dated August 6, 1948?

A. No, sir, I had not.

Q. Had you submitted your file to Bolich, your file on the investigation?

A. No, sir.

Q. Had you submitted your file to Baradell?

A. No, sir.

Q. Had you submitted it to Murphy, the agent in charge?

A. No, sir.

Q. Had you submitted it to your group chief, Dowling?
A. No, sir.

* * * * * * *

Cross-examination.

By Mr. Bennett:

* * * * * * *

Q. It is done every day, isn't it?
A. I don't know whether it is done every day.
Q. Well, comparatively speaking, it is a customary, ordinary procedure which everybody is familiar with?
A. You are making it sound rather common, sir. I don't believe it degenerates to that extent.
The Court: Is it common or uncommon?
The Witness: It is rather uncommon in my experience.

* * * * * * *

Q. Well, now, did somebody ask you for a progress report, status report in August?
A. Yes, sir.
[fol. 147] Q. By that time you had had the case six months, is that right?
A. Yes, sir.
Q. Was there anything unusual about being asked for a progress report after you had a case for six months?
A. Yes, sir.
Q. Isn't a status report something that is done frequently in the office?
A. No, sir.
Q. Your superiors are never interested in what you are doing? Is that what you suggest?
A. I am not suggesting that at all, sir.
Q. Have you made status reports in other cases?
A. Yes, sir.
Q. In how many other cases?
A. Two other cases.
Q. In what period?
A. 1947 or 1948.

Q. So in two years you had in three cases been asked to render a status report?

A. Yes, sir.

Mr. MacMahon: Did I understand—

The Court: I didn't understand. Only three since you have been a special agent since 1945?

The Witness: Only three status reports.

The Court: And they were all in those two years?

The Witness: That is my recollection, your Honor.

Q. How many cases were you working on in those three years?

A. I believe my inventory ran about 12 to 15 cases.

Q. So that in about one-fifth of the cases you were working on you were asked in all those years for a status report, right?

A. I have been asked for three status reports since I have been a special agent, sir. I don't know what my [fol. 148] average inventory was. It is my recollection, 12 to 15.

Q. Well, did you know what a status report was at the time in August 1948?

A. Yes, sir.

Q. And you knew it from having been asked to give it before?

A. Yes, sir.

Q. Is it something that a man needs to tell you about or is it part of the regular routine that you were familiar with?

A. I have to be told to submit that.

Q. But what to submit when you are asked to submit a status report you know?

A. I believe I know.

Q. And you did submit one in this case?

A. Yes, sir.

Q. Had you talked with Mr. Saver prior to that time?

A. No, sir.

Q. About how long after that was it when you first talked to Mr. Saver?

A. Oh, several days later.

Q. A week? Somewhere within that period?

A. I don't think it was a week. I think it was less than a week.

Q. Now, when you submitted that status report, had you heard anything about the subject of voluntary disclosure or cooperation up to that time?

A. No, sir.

Q. You hadn't been in touch with any representatives of the taxpayer up to that time?

A. That is correct.

* * * * * * * *

The Court: Did your function cease when it was decided that there was to be no criminal prosecution?

The Witness: Yes, sir, your Honor. My function is to discover and evaluate and present the evidence to support [fol. 149] the recommendation for a criminal prosecution.

The Court: After that it was returned to the Ninth Avenue office?

The Witness: It wasn't returned. They continued me in the case, to stay in the case, but why I don't know.

Q. Would you say that the Ninth Avenue office was trespassing on your territory throughout 1948 and 1949?

Mr. MacMahon: Your Honor, I object to the form of that question.

The Court: I don't know what you mean by trespassing.

Mr. Bennett: Why, he has just said that they continued in the case but he doesn't know why.

The Court: He says he continued in the case.

Mr. Bennett: I am sorry, I misunderstood.

The Court: He says he continued in the case.

Mr. Bennett: I am sorry.

Q. You don't know what you were doing in the case from January 1949 to November 1949?

A. No, sir, I don't know why I was told to continue on the case. I know what I was doing.

* * * * * * * *

The Court: Did you have anything to do with computing the amount of the taxes shown in this final report?

The Witness: No, your Honor.

[fol. 150] The Court: You relied entirely upon Mr. Scherm at the Ninth Avenue office for those figures?

The Witness: Mr. Scherm or any other revenue agent, sir, on a joint investigation.

* * * * * * *

Cross-examination.

By Mr. Gottesman:

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Q. Mr. Clayton, you were told to continue on this case even though criminal prosecution had been waived, is that correct?

A. Yes, sir.

Q. Were you told what the reason was that you were to continue on this case?

A. My recollection is that it was to insure that the report was written—when we wrote our report we would recommend the assertion of the fraud penalties.

Mr. Aranow: I can't hear.

(Last answer read.)

Q. And from January 10th on, Mr. Clayton, you, Mr. Recchia, and Mr. Scherm went from time to time to the office of Pattullo Modes, is that correct?

A. No. After that date Mr. Recchia didn't go with us. Mr. Scherm and myself did.

Q. Just you and Mr. Scherm?

A. I am not sure whether we continued working at Pattullo Modes or whether we had gathered up information in work sheets and we were working in my office. We probably were going back and forth depending on the par-[fol. 151] ticular project we had in hand for the particular day.

Q. Now, would your daily record show this? I mean your diary would show where you worked at?

A. Yes, sir, I hope so.

Q. Now, Mr. Clayton, what type of work were you doing from January 10th on with Mr. Scherm?

A. I was doing what might be called analytical accounting work, I believe would describe it.

Q. In what respect, Mr. Clayton?

A. We were reviewing and analyzing the information that had been submitted to us in work sheet form for the most part, the work sheets having been prepared by Weisberg & Greenstein.

Q. And did you find that those reports for the most part were correct or incorrect?

A. I had no objective standard, sir, to determine whether they were correct or incorrect.

Q. Well, did you check them from the analytical standpoint? Unfortunately I am not familiar with accounting. When you say analytical accounting to me, just what do you mean?

A. I mean that we were taking the information that was made available to us and we were attempting to follow it through to other documentary information that was available to us, all of which had been submitted through or by the taxpayers.

* * * * * * *

Q. On page 3 of your report, if I may call your attention to it, you make the following statement:

> "Results of Audit by the Revenue Agent:
>
> "The following figures of deficiencies in taxes and [fol. 152] penalties recommended have been verbally supplied by Revenue Agent Scherm whose reports have not yet been transmitted to this office. In this connection attention is invited to the fact that such figures are subject to change upon review in the revenue agent's office."

What is meant by that, Mr. Clayton?

A. The agent's report——

Q. I am sorry. Perhaps I can withdraw the question and rephrase it.

The agent's report is not final as far as the agent's office is concerned, is that correct?

A. It might even mean that the agent hasn't even started

writing the report. He has completed technical adjustments.

Q. Technical adjustments?

A. Yes.

Q. And then when that report goes in, is the agent's report final, or is that return for review?

A. You are asking me for procedure in the Internal Revenue agent's office. I believe his draft went to review through his immediate superior.

* * * * * * *

Re-direct Examination.

By Mr. MacMahon:

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Q. Mr. Clayton, when you went to Pattullo Modes on November 19, 1948, and were told by Davis that the taxpayers intended to cooperate at that time, what in- [fol. 153] formation did you have in the files other than what you had learned from the examination of Loehmann's August and the circularizations you had made within the governmental departments?

A. From one of the governmental authorities I had a record that Mrs. Segel had accumulated a substantial amount of United States Savings Bonds. I knew the location, identity of the personal checking accounts of the individuals.

Q. Was there anything at all in your file that tended in any way to exculpate these taxpayers from criminal fraud?

Mr. Aranow: I object to the form of the question.

The Court: You mean as of that time?

Mr. MacMahon: As of that time.

The Court: I will allow it.

Mr. Aranow: Exception.

A. No, sir.

* * * * * * *

JOSEPH R. BARADEL, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. MacMahon:

* * * * * * *

Q. How long had you been in the Internal Revenue service, Mr. Baradel, at that time?

A. I retired after 34 years, two years ago.

Q. At any other time while you were in the special [fol. 154] agent's office in New York, did the Assistant Commissioner of Internal Revenue ever call you and tell you not to prosecute a case?

A. No, sir.

Mr. Bennett: I object to that as immaterial and irrelevant.

The Court: I will allow it.

Mr. Bennett: Exception.

Q. You may answer.

A. No, sir.

Q. In this conversation did Mr. Bolich ask you anything about the merits of the Pattullo case?

A. No, sir.

Q. Had you sent him any of the file in the Pattullo case up to that time?

A. No, sir.

Q. Had you been told prior to that time of any promise not to prosecute?

A. No, sir.

Q. So far as you know, had Dowling or Clayton been told of any promise not to prosecute?

A. Not so far as I know.

Q. You said that in that conversation you had turned them down on a voluntary disclosure?

A. Yes, sir.

Q. Do you recall when that was?

A. That was I think November 3rd or 4th of 1948.

Q. Why had you turned them down, Mr. Baradel?

A. Well, I had decided that it was not a timely disclosure. I decided that the statement made by Mr. Smith in support of that claim was not true.

Q. You mean the affidavit by Smith was not true?

A. The affidavit submitted by Smith.

* * * * * * *

Q. Would you try to recollect what you said to them, Mr. Baradel?

A. I believe I said, "I hope this is a lesson to you. If [fol. 155] you try any monkey business again, you are surely going to jail"—words to that effect.

Q. Is that all you said?

A. I don't remember the exact conversation, sir. That is about what I said.

Q. Did you express anything about whether they were lucky or unlucky with this result?

A. Yes, I probably did.

Q. What did you say?

A. In part of that same conversation I probably told them, "You are very lucky you didn't go to jail on this one"—words to that effect.

Q. That is your best recollection?

A. That is my best recollection.

* * * * * * *

Q. On January 5, 1949, I believe you stated Mr. Walter Murphy was the agent in charge?

A. No, Mr. Frank was. He had succeeded Murphy I think late in November in 1948.

Q. At the time you received this telephone call from Bolich on the 5th of January, did you relate or report that back to Mr. Frank?

A. No, sir.

Q. At the January 10th conference, when you advised the taxpayers of the fact that they would not be prosecuted, did you at that time relate that or report that to Mr. Frank?

A. No, sir.

Q. At the time you had this telephone call from Bolich

which you just testified to with reference to the explanatory memorandum, did you report to Frank?

A. No, sir. I discussed it with him within two days; probably the next day I had a discussion with Mr. Frank about it.

Q. And what was that discussion?

A. Well, Mr. Frank at that time had received a report. [fol. 156] I think I cleared the report on November 29, and I think Mr. Frank talked to me the next day, December 1st or 2nd.

* * * * * * *

Q. Mr. Baradel, do you recall at sometime there was a Committee of Congress called the King Committee?

A. Yes, sir.

Q. And did you have any discussion with Mr. Bolich pertaining to the King Committee?

A. Yes, sir.

Q. Did you have any discussions with him at that time pertaining to the Pattullo Modes case?

A. Yes, sir.

Q. Would you state what those discussions were?

Mr. Aranow: Fix the time and the date, where.

The Court: Can you fix the approximate date?

Q. About when was this?

A. I believe it would be in August, 1951.

Q. And where did you have your talk with Mr. Bolich?

A. Well, Mr. Bolich was in our office about that time.

The Court: In New York?

The Witness: In New York on a visit and I discussed the fact that the King Committee called for that file and that I had talked with Mr. Dewind and I think Mr. Surry of the King Committee counsel, and had made available to them my diary on the case.

Q. What did he say?

A. I don't recall that he made any particular comment. At that time I was keeping the people in Washington fully [fol. 157] informed as to the lines of investigation that the King Committee seemed to be pursuing. I had almost daily conversations with my chief down there, Mr. Wolf, and apprised him as to the line of investigation at that

time, the names of the cases they were asking for and the question of my procedure with them, as to how far I could go with them in giving them files and things of that sort.

Q. And did you have similar conversations from time to time with Mr. Bolich?

A. I can't recall any specific ones. I do recall on the occasion of his visit to 253 that I just referred to, I did mention Pattullo Modes on that occasion. I don't know that I did or did not prior to that time. I believe that was the last time I talked to him. I might have talked to him on the phone prior to that time, but when they asked for the file, or at the time they first talked to me about the case, I am not sure, Mr. MacMahon, when it was.

. . . . . .

Cross-examination.

By Mr. Aranow:

. . . . . .

Q. Didn't he go a bit further?

A. He may have.

Q. Didn't the cooperation include future cooperation by the taxpayers?

A. It may, Mr. Aranow. I don't know that there was any distinction made.

Q. I will show you the paper and see whether or not it refreshes your memory. Just look at the top of page 3 and see whether or not it refers to future cooperation. [fol. 158] Mr. MacMahon: I object to that, your Honor.

The Court: A lawyer's brief doesn't prove it. You can ask this man what his recollection is.

Q. I am asking what is your recollection?

The Court: Whether that changes his recollection.

The Witness: Is it all right for me to read it?

The Court: Yes, you can read the top of that page.

Mr. Aranow, what a lawyer says in a brief isn't necessarily evidence.

Mr. Aranow: I am not saying that. Whether that refreshes memory with reference to the statement.

The Court: Yes.
The Witness: Yes, it does.

Q. Does that refresh your memory?
A. Yes, sir.
The Court: What did he say?
Q. What did he say?
A. He said if they continued, if they cooperated and continued to cooperate in every way.
Q. Then in that case they would receive consideration of non-prosecution?
A. That is what Mr. Saver stated.
Q. And isn't it a fact that that is the same thing that Mr. Bolich told you?
A. I believe it isn't exactly the same, Mr. Aranow. My impression of what Mr. Bolich told me was it was to be closed, non-prosecution. Mr. Saver makes the point that they would receive non-prosecution consideration.
[fol. 159] Q. Didn't Mr. Bolich tell you if and when they fully divulge the facts and fully cooperated with you, that then they should receive non-prosecution consideration?
A. I can't say that he used that expression. I don't remember that expression from Mr. Bolich. I know he did make a point of cooperation, which I then verified through talking with the agent.
Q. Didn't he ask you to find out whether they had done these things that they promised to do?
A. No. He made the statement to me and I followed through and found that they had done what he asked them to do.
Q. Did you ask them whether they had cooperated?
A. Yes, I asked the agent, yes, sir.
Q. And they told you they did receive——
A. Yes, that is correct.
Q. Full and complete cooperation?
A. Yes, sir.
Q. At that time, sir, the Smith affidavit was still in existence, was it not?
A. Yes, sir. I had it.
Q. That had not been disproved?
A. I didn't believe it.
Q. You had no evidence or no admission by anyone that

it was false? Did Mr. Saver argue that it was a genuine affidavit at that time on the 10th of January?

A. I think I did most of the talking at that conference, and Mr. Smith did some talking. Mr. Saver did very little talking.

Q. Then you advised the taxpayers if they would continue to cooperate, is that correct, if they would continue to cooperate there would be no-prosecution consideration?

A. On January 10th, Mr. Aranow, I believe that the cooperation had been rendered according to what the agents told me at that conference in front of Saver and the taxpayers. I don't think they thought that there had been any necessity for any further——

[fol. 160] Q. Any further investigation?

A. That thought didn't occur to me. The agents certified to me that they had received full cooperation. I presumed at that point that their investigation was about completed.

* * * * * * *

Cross-examination.

By Mr. Bennett:

* * * * * * *

Q. Did Mr. Saver say to you that Mr. Bolich had told him that if the taxpayers cooperated fully they would receive no-prosecution consideration?

A. That is what Mr. Saver said.

Q. And did you also understand that same—did you also have that same understanding from Mr. Bolich?

A. I don't think it was quite the same, Mr. Bennett. I thought it was pretty direct when Mr. Bolich told me.

The Court: What do you mean by pretty direct?

The Witness: That there would be no prosecution. I think the word consideration I learned for the first time on January 10th, and I later adopted that expression in my memorandum of November to be on the safe side.

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[fol. 161] JOHN P. MEEHAN, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination.

By Mr. O'Hara:

Q. Mr. Meehan, by whom are you employed?
A. U. S. Treasury Department, Income Tax Unit.
Q. For how long have you been so employed?
A. 19 years and eight months.
Q. In what capacity are you employed?
A. I am a group supervisor in the Upper Manhattan District.
Q. Is that the revenue agents' office?
A. Revenue agents' office.

* * * * * * *

Q. Mr. Meehan, have you ever been assigned to audit the Pattullo Modes tax returns?
A. I have.
Q. For what years, what tax years were you assigned?
A. I was assigned to review the tax years 1942 to 1946, inclusive, and make an examination of the years 1948, 1949, and 1950.
Q. When were you assigned?
A. September, 1951.

* * * * * * *

Cross-examination (continued).

By Mr. Gottesman:

* * * * * * *

[fol. 162] Q. Did you ever make a report of this case?
A. No, sir, I have never completed a final report on this case. There were too many loose ends that I couldn't tie up.

* * * * * * *

ELIZABETH V. CUNNINGHAM, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination.

By Miss Goldman:

* * * * * * *

Q. Did such calls come for Mr. Bolich on more than one occasion?

A. I imagine more than one occasion.

Mr. Aranow: I move to strike out the answer, what the lady imagines.

The Court: Well, how many occasions, approximately?

The Witness: I have no idea, sir.

The Court: More than one?

The Witness: More than one, but I wouldn't have any idea of any number.

Miss Goldman: No further questions.

The Court: How did this person identify himself? Who did he say was calling?

A. Captain Henry? Is that what you said?

The Witness: Yes, sir.

[fol. 163] The Court: Did you know who Captain Henry was?

The Witness: No, sir.

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EVERETT HARDING, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination.

By Miss Goldman:

* * * * * * *

Q. Now, Mr. Harding, do you know who occupied the Woodring suite, 319, 320 and 321, from November 22, 1948,

to October 23, 1949, and 419, 420 and 421 from October 24, 1949, to October 25, 1950?

The Court: You are talking about two separate suites now.

Miss Goldman: Yes, the suites identified on Government's Exhibit 61 for identification.

The Court: Yes, all right. You may answer.

A. I believe Mr. Grunewald occupied the suite most of the time.

The Court: Which suite?

The Witness: Each suite.

The Court: Both of them.

The Witness: Yes.

* * * * * * *

[fol. 164] The Court: Then if Mr. Bolich had been charged for that rent would his name have appeared on the bill? Would the bill have been rendered to him for rent?

The Witness: Yes, sir, that is correct. It would.

* * * * * * *

Q. Now, Mr. Harding, do you know Daniel Bolich?

A. Yes.

Q. Do you see him in the courtroom?

A. Yes; that is Mr. Bolich (indicating).

Miss Goldman: May the record show that the witness has identified Daniel Bolich?

The Court: Yes.

Q. Do you know whether or not Daniel Bolich was a resident of the Washington Hotel from June 22, 1949, to June 22, 1950?

A. I could not tell you that unless we had records to show such occupancy.

Q. Do you have such records, Mr. Harding?

A. The hotel does not, no.

Q. Were there such records?

A. There were records in that period, yes.

Q. Where did you last see those records?

A. I handed those records to Mr. Bolich myself.

Q. Can you place the date and the circumstances of your handing these records to Mr. Bolich?

A. Mr. Bolich had asked me——

Q. First, can you place the time that Mr. Bolich asked you this?

A. I think it was in the late summer or mid-summer of 1949, I believe it was.

[fol. 165] Q. Mr. Harding, I am asking you now about records as to the period between June 1949 and June, 1950.

A. Well, those were the records that were missing.

The Court: Now the question was when did Mr. Bolich talk to you about those records approximately?

The Witness: That was in the summer of 1949.

The Court: He talked to you about records ending in 1950 in the summer of 1949?

The Witness: I beg your pardon.

The Court: Now, think it over and give us your answer.

The Witness: I am sorry, sir. It was in 1950 that Mr. Bolich asked me could he get approximately a year back of his records so that he might review them.

Q. Was there any further conversation at that time about the records?

A. I know I said to Mr. Bolich, "Is there any particular voucher record that you would like to see? If so, I would try to get that for you, but I could not get all of the voucher records out for the simple reason that it would take too long."

Q. Did Mr. Bolich say anything in this conversation?

A. He said he was not interested in the voucher records at all. He just wanted to review his bills of approximately a year back.

Q. And thereafter, did there come a time when you gave these records to Mr. Bolich?

A. Yes, I would assume—I do not know the dates, but I would assume—it was anywhere between one to two months later.

Q. And at the time that you gave Daniel Bolich these [fol. 166] records, was there any conversation?

A. I believe Mr. Bolich, as I recall now, to the best of my recollection, came in one afternoon, late afternoon, and asked me if he could have the records. I said, "Yes, I

have them here for you." and I handed the records to Mr. Bolich and he left the office.

Q. Was there any further conversation about the records at that time?

A. None other than that I believe I said to him—I believe the words now, I will not be positive about this, but I think I said—I knew Mr. Bolich as Daniel. I called him Dan, and I believe my words to him were, "Dan, when you finish with the records, would you please return them."

The Court: Were those the original hotel records?

The Witness: They were the originals, yes.

The Court: The only records you had at the hotel on those items?

The Witness: Well, no, sir. I know at that time we had the voucher records, you see, which were, for instance, long distance records and restaurant checks.

The Court: But these were the only compiled records of bills?

The Witness: Yes, sir.

Q. Did Daniel Bolich ever return those records to you, Mr. Harding?

A. No.

Q. Did you ever request them of him?

A. There was a letter written which I signed requesting them.

Q. Can you tell us the time of that approximately? When did this occur?

[fol. 167] The Court: The letter, you mean?

Miss Goldman: Yes, sir.

A. That was after the hotel had been subpoenaed for all of its records by the King Sub-Committee.

(Government's Exhibit 64 for Identification marked.)

Q. Mr. Harding, I show you Government's Exhibit 64 for Identification and ask you what that is (handing).

A. This is a subpoena by the King Sub-Committee on Administration of Internal Revenue for the records of the Hotel Washington.

Q. And is this the subpoena to which you just referred in your testimony?

A. This is the same, yes, which was submitted to us on December 11, 1951.

Miss Goldman: I offer this in evidence, your Honor.

Mr. Corbin: Objected to as wholly irrelevant and immaterial.

Mr. Singer: Objected to.

The Court: It is established the date on which he received the subpoena. Does that refresh your recollection that that was the day on which you received that subpoena?

The Witness: Yes, sir. Frankly, I assume it was the same day. It has been so long ago that I do not know whether we were served the same day the subpoena was made out.

The Court: Was it approximately that day?

[fol. 168] The Witness: It was approximately that time, yes, sir.

The Court: December 1951?

The Witness: Around that time.

The Court: I don't think you need to offer it in evidence at the present moment. If something else develops, why——

Q. You have said you received a subpoena from the King Committee for certain documents?

A. That is correct.

Q. This was in the course of describing the circumstances of your request to Mr. Bolich?

The Court: You said you sent a letter to Mr. Bolich. When did you send the letter?

The Witness: The letter was after we found out that these bills had not been replaced in the files of the hotel and could not be found, and a letter was written which I signed asking Mr. Bolich to please return the records.

Q. Did the letter say anything else in reference to the records?

A. I believe the——

The Court: Have you got a copy of the letter?

The Witness: No, sir, I don't.

The Court: Go ahead.

The Witness: I believe in the letter there was a notation

made that we had been subpoenaed for those records. I don't recall all of it. The letter is not in the files at the hotel, and I don't know where it is.

[fol. 169] Q. Have you caused a search to be made for your copy of it?

A. We have, yes.

Q. Did there come a time, Mr. Harding, thereafter when you received a communication from Mr. Bolich in relation to these records?

A. Yes. There was a phone call from Mr. Bolich to me asking me about the records.

A. Yes. There was a phone call from Mr. Bolich to me asking me about the records.

Q. Can you place the date of the phone call?

A. The date I believe was December 20, 1951.

By the Court:

Q. Where were you at the time?

A. I was at my home in Arlington, Virginia.

Q. That was a telephone call?

A. Telephone call.

Q. You recognized Mr. Bolich's voice?

A. Yes, I did.

Q. What did he say?

A. The substance of the call was that Mr. Bolich said he had not received the records—let us see now, it has been so long ago, sir, I am sorry, I will do my best—he had not received the records, that he had been in bed with a bad heart. I told him I was very sorry to hear that.

Q. What records hadn't he received?

A. The year of records that were missing between 19——

Q. You say you gave those records to him?

A. That is right, I loaned records to Mr. Bolich.

Q. Mr. Bolich then called you at your home in Arlington and said he had not received the records from you?

A. Yes, sir.

Q. So he was disputing it?

A. Yes, sir.

Q. What did he say then?

A. I will have to refer, I am afraid, to my——

[fol. 170] By Miss Goldman:

Q. Do you have with you a document which would refresh your recollection as to the contents of this phone call?

A. Yes, sir.

The Court: Have it marked for identification.

(Marked Government's Exhibit 54 for Identification.)

Q. Mr. Harding, I show you Government's Exhibit 65 for Identification and ask you if that refreshes your recollection (handing).

The Court: First of all, what is this? Is this a memorandum you made?

The Witness: Yes, sir.

The Court: When did you make it?

The Witness: It was approximately a day or two after the phone call, several days after the phone call, anywhere from two to three. I do not know the exact time.

The Court: Now, read that and see if it refreshes your recollection.

* * * * * * *

By Miss Goldman:

Q. Does this letter refresh your recollection, Mr. Harding?

A. It refreshes my recollection, yes, to the phone call, but——.

The Court: That is all the question is about.

The Witness: Mr. Bolich said he did not receive the [fol. 171] records, and later in his conversation said he simply did not remember ever having received them; that if he had, he knew he had not taken them from the office or away from the office; that it could have been that he might have laid them on Mr. Rhoades' desk or something of the sort there, that he knew he had never taken them away from the office.

The Court: What did you say to him?

The Witness: I said, "Don't you remember coming in the office and my handing you the records?"

He said, "No, I do not. I simply can't ever remember receiving the records."

Then Mr. Bolich mentioned about his having been in bed with a bad heart. Mr. Bolich mentioned also being in Room 511 with Mr. Routzahon.

Q. Is that as much as you can remember?

A. No. I told Mr. Bolich that we had all been worried because the records had not been returned, that the hotel had been subpoenaed for the records.

Q. Was there any discussion about the existence of other records?

A. Yes, there was. I believe Mr. Bolich said, "There must be other records" or "Have you seen other records?" or "There must be other records."

I said yes, I had seen a record where he and Mrs. Bolich had moved into, I believe it was, Mr. Woodring's suite, 319, 20 and 21 I believe at that time.

Q. Was there any discussion of the existence of records of the period of the missing records, June 1949 to June 1950?

A. Yes, that is true, because I said that the auditor had discarded the voucher records, which left us no records at [fol. 172] all, and I believe Mr. Bolich said, "Well, if you have your voucher records, you could reconstruct your bills from that," and I said yes, we could have, but as it stood, we had no bills at all.

The Court: Is that the end of that telephone conversation?

The Witness: That is as much as I can remember, sir, right now.

* * * * * * *

Q. Mr. Harding, when court adjourned last night you had just testified that you had handed Daniel Bolich hotel records for his occupancy of your hotel from June of 1949 to June of 1950 and that when you had received the subpoena from the King Committee for those records you had requested them of him?

A. That is right.

Q. Now, limiting yourself to that period from June 1949 to June 1950, do you know whether Mr. Bolich resided in your hotel during that time?

A. Yes, he did.

Q. Where in the hotel did he reside during that period?

A. Partly in Suite 319, 320 and 321, and then changed some time during that period to 419, 420 and 421.

Q. Who else occupied that suite during that period?

A. Mr. Grunewald.

Q. And under what name was this suite registered during that period?

A. Mr. Harry Woodring.

* * * * * * *

Q. Mr. Harding, I show you Government's Exhibit 66 for identification and I ask you what that is.

A. This is a registration card of the Hotel Washington.

[fol. 173] Mr. Singer: A little louder.

The Witness: This is a registration card of the Hotel Washington in the name of Max Halperin, and the bill attached thereto for that period of occupancy.

The Court: What is the date of the registration?

The Witness: The date of the registration, sir, is December 14, 1948.

Q. Is Government's Exhibit——

Mr. Singer: If your Honor please, there is no need for testimony. If the witness has these records I will concede they are records of the hotel and I will concede that they can be offered in evidence.

The Court: All right. Do you offer them in evidence.

Mr. Singer: If he identifies them as records of the hotel. Let me look at them and we can same time.

The Court: Show them to Mr. Singer.

Mr. Singer: I offered to do this before so we don't have——

The Court: No, I just want to make sure you have no objection to their being offered in evidence.

Mr. Singer: Perfectly all right, the others she has just shown me.

The Court: All right.

Now, Miss Goldman, you have a series of registrations at this hotel by the defendant Halperin and bills for the occupancy?

[fol. 174] Miss Goldman: Yes, your Honor.

The Court: I understand Mr. Singer has no objection.

Mr. Singer: I have been shown Exhibit 66 to 70 for identification. I consent that those go into the record.

The Court: And it is admitted they were records kept in the regular course of business.

Mr. Singer: Yes, your Honor.

The Court: They are received in evidence.

(Government's Exhibits 66, 67, 68, 69, and 70 for identification received in evidence.)

Mr. Singer: As to this other group which I assume will be marked the next consecutive number, 71, I concede they are records of the hotel kept in the regular course of business and I have no objection to them.

* * * * * * *

Cross-examination.

By Mr. Corbin:

* * * * * * *

Q. Yes, Mr. Grunewald and Mr. Woodring had 319, '20 and '21 from sometime in the middle or latter part of November, 1948, didn't they?

A. In the name of Mr. Harry Woodring.

Q. Well, in the name of Mr. Woodring.

[fol. 175] The Court: Who occupied it most of the time?

The Witness: Mr. Grunewald.

Q. Was Mr. Grunewald's name on the registration card, Exhibit 61-A, do you recall (handing)?

A. This registration card is in the name of Mr. Harry Woodring.

* * * * * * *

Q. Anyway, did you know or learn or observe that he, Mr. Woodring, and Mr. Daniel Bolich were friendly or friends?

A. I do not know that, sir. The only thing that I know is that Mr. Bolich lived in that suite while it was under the name of Mr. Woodring.

* * * * * * *

Q. Well, seriously, did Secretary Woodring and Mr. Grunewald have the right so far as your hotel was concerned, to allow Mr. Bolich to use one of the rooms of suite 319 to 21?

A. They had every right to, yes.

Q. Do you know whether Mr. Bolich used that room day times?

A. Not to my knowledge. I believe Mr. Bolich——

The Court: No, not what you believe. Do you know whether he used it day times?

The Witness: No, sir.

The Court: All right, just answer what you know.

Q. Do you know that he used it to sleep in?

A. Yes, sir, I do.

[fol. 176] Q. Now, referring to those years 1948 and 1949, while Mr. Grunewald was in the fourth and the third floor suites, did you observe whether or not other persons besides his own employee frequested [*sic*] the suite?

A. I have no personal knowledge of that, sir. I could not say.

Q. Didn't you know or observe or learn, so that you can tell us, that there was activity during the daytime, persons calling and leaving?

A. Yes, sir, people would come to the desk and ask for Mr. Grunewald, his suite number.

Q. And did you recognize any of those people who visited and called on Mr. Grunewald at your hotel?

A. Some, yes, sir.

. . . . . .

By Mr. Singer:

Q. Now, let me see: When did you say you first met Mr. Halperin? Was it in 1950?

A. I don't remember when I first met Mr. Halperin. I couldn't tell you.

Q. You don't know? Did you ever see him in 1948 or 1949 at all?

A. Mr. Halperin had been coming to the hotel to my knowledge the last five or six years.

Q. And how about long before that?

A. I can't tell you.

Q. You don't know when you first saw him?
A. No, sir, I don't.
Q. You don't know in what year?
A. No.

Cross-examination.

By Mr. Aranow:

[fol. 177] Miss Goldman: Then I again renew the Government's offer of Exhibit 63 for identification.

The Court: What is that?

Miss Goldman: The record of Mr. Bolich's occupancy of the Washington Hotel from June 22, 1950, to April 30, 1951.

The Court: That was an entirely separate suite?

Miss Goldman: Yes, your Honor.

The Court: What is the relevancy?

Miss Goldman: This completes the record as to the dates for which the hotel doesn't have the records.

Mr. Aranow: You had June, 1949, to June 22, 1950.

Miss Goldman: Yes.

Mr. Aranow: This starts off June 22, 1950, and goes to 1951?

Miss Goldman: Yes.

The Court: Have you any objection to putting those in evidence?

Mr. Aranow: It is encumbering the record so. I don't see any materiality to them. I would have to see them and examine them. I don't know what it is.

The Court: I don't see that it adds very much.

Mr. Aranow: I will concede that he was in the hotel, for this purpose.

The Court: During that period of time?

Mr. Aranow: During that period of time.

The Court: All right. What room is it conceded he was in?

[fol. 178] Miss Goldman: From June 22, 1950, to October 20, 1950, he was in room 404.

Mr. Singer: Under his own name.

Miss Goldman: Yes. And from October 20, 1950 to April 30, 1951 he was in room 647.

Mr. Singer: Under his own name.

Miss Goldman: Yes.

* * * * * * *

CAMERON H. PULLEY, called as a witness in behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

By Mr. O'Hara:

* * * * * * *

Q. Have you had occasion to be in either these suites when Henry Grunewald was making telephone calls?

A. Yes, I have heard him talking on the telephone, making calls, numerous times, and at sometimes when he would use the telephone, he would say, "This is Captain Henry." I didn't know whom he was talking to, but I do recall that sometimes he would use that expression.

Q. Do you recall how many telephones there were in these suites? Do you recall the telephone setup?

A. Well, there were two bedrooms in each suite, and as I recall, each bedroom had a telephone, and then there was a private phone that did not go through the hotel switchboard, a private phone put in.

[fol. 179] Q. Did you ever have any conversation with Henry Grunewald with respect to telephones?

A. Oh, it was his general expression to me not to use the telephone through the switchboard because those numbers were taken down through the board, and then a private phone put in for local calls anyway.

Q. Do you recall anything further in connection with the telephone?

A. Well, Mr. Grunewald often used pay station telephones.

Q. What was your observation in connection with his use of pay station telephones, if any?

A. He used it quite often. It was sort of a standing joke that when you couldn't find Henry any place else, you

could look in the telephone booths and you would find him there somewhere.

Q. Did you ever have any conversations with him with respect to the use of telephone public booths?

A. I have talked to him about use of telephones. He had the feeling, and so expressed it to me, that many phones probably were tapped in Washington, and that it was safer to use pay stations when you had private conversations to carry on. He often carried a large amount of coins, more than anyone I knew, certainly more than I ever did, for telephoning.

Q. Did he ever ask you to obtain change for him for that purpose?

A. Oh, I think I have obtained coins for him.

Q. Was anyone occupying either of these suites to your knowledge at night, sleeping overnight?

A. In the suite over Pennsylvania Avenue there was a man who occupied it in one room for a while, two or three months, as I recall, and then in the second bedroom, quite often people would come and stay at night, stay a day or two, something like that. I recall one young fellow [fol. 180] whose name now has slipped me, that he stayed two or three weeks there as a visitor in one of the bedrooms. That was over Pennsylvania Avenue.

Q. Do you know where Daniel Bolich lived?

A. I saw Mr. Bolich in the suite over S street.

The Court: That is the one in the back at the opposite end of the hotel, the Pennsylvania Avenue Suite, do you mean?

The Witness: No, your Honor. The first one is over Pennsylvania Avenue and 15th Street. The second one, where I saw Mr. Bolich the only one time I can recall, was over 15th and F Streets.

The Court: The opposite corner of the hotel?

The Witness: Yes, sir, the opposite corner on 15th Street.

Q. Do you know Max Halperin?

A. Yes, sir.

Q. Do you see him in the courtroom?

A. I do.

MAX HALPERIN, one of the defendants, called as a witness in his own behalf, being first duly sworn, testified as follows:

Cross-examination (continued).

By Mr. O'Hara:

Q. Now I believe you stated that at this conference that took place at 61 Broadway the cash fee had been men-
[fol. 181] tioned and Mr. Tobias became alarmed and put on quite an act?

A. He became excited.

Q. He became excited?

A. I didn't say that; Davis told me it was an act.

Q. On the way back Davis told you that that was an act, is that right?

A. That is correct.

Q. And he told you, he said, you wait and see, pretty soon Mr. Berman is going to call up and say that it is okay, is that right?

A. That is right.

Q. And Mr. Davis was right in that? He subsequently did call up and say it was okay?

A. Mr. Davis told me that Mr. Tobias called up and he says that Mr. Berman called up, and he said, "Go ahead with the matter, it is all right."

Q. And Davis told you this cash fee was to go to some other lawyer, is that right?

A. That was the conversation down at 61 Broadway in the presence——

Q. Was that your conversation with him later? Did he say that to you?

A. It was in the presence of Mr. Berman and Mr. Tobias at 61 Broadway, a cash fee was mentioned for another lawyer, yes, sir.

Q. Following your return didn't you have a further conversation which you related on direct examination with respect to the cash fee with Davis?

A. I did.

Q. And did Davis then say to you that that cash fee was to go to another lawyer?

A. I said to Davis——

Q. Did he say to you that it was to go to another lawyer?

A. Yes, he did repeat that.

Q. Did he tell you the name of that lawyer?

A. He did not.

Q. Then following that time, at the time that the package, you say this package went in the box, there was a further conversation about it, is that right?

A. In our office.

[fol. 182] Q. In your office?

A. Not about the lawyer. I mean about the cash.

Q. About the cash?

A. Yes.

Q. And at this time you were actively associated in this case, is that right?

A. Yes, I had had a conference with Mr. Berman and I had a conference with Mr. Tobias and it was recognized that I was to do some work with Mr. Davis and that I was to get 40 per cent of the fee.

Q. You were perfectly willing to go along in a case where another lawyer was to obtain a cash fee whose name you didn't know?

A. I had nothing to say about that.

Q. You had nothing to say about it?

A. No.

Q. You could have withdrawn from the case, couldn't you, Mr. Halperin?

A. There was no reason for me to withdraw.

Q. You don't mean to infer that there was anything wrong in this conversation that took place?

A. No, certainly not.

Q. Not a thing?

A. No.

Q. A cash fee that was to go into a box and be paid to a lawyer that you didn't know and that he refused to tell you the name of?

A. That is correct.

Q. Did that strike you as being the kind of relationship you would want to enter into?

A. I was just curious about it. I didn't see anything wrong about it. It was Mr. Davis' case. He had some other lawyer that he wanted to retain in the matter to do some work. I had nothing to do with it. He told me that that was the agreement between Tobias and Mr. Davis and Mr. Greenstein.

Q. Well, you didn't mean to infer before then, that when Mr. Davis told you "You wait and see Mr. Berman [fol. 183] is going to call up and say that is all right; that is just an act Mr. Tobias is putting on," that did not in any way arouse your suspicion about it?

A. No, it did not.

Q. Tobias was Mr. Berman's accountant?

A. Tobias was Mr. Berman's accountant.

Q. And he was putting on an act about this cash fee in front of Mr. Berman?

A. He was excited about it.

Q. You said Davis described it as an act?

A. Yes, Davis says that Mr. Tobias was acting, that Tobias and Berman will have a talk about it and that he will agree to those conditions.

Q. And you had been practicing law at that time about 40 years, and that didn't arouse your suspicion?

A. It didn't arouse suspicion.

Q. Why the man who Berman was paying himself, his own accountant, was putting on an act at that time?

A. That is what Davis told me.

Q. Davis told you that, and that didn't arouse any suspicion on your part at all?

A. No.

Q. Then subsequently you had a conversation with Davis when you asked him about that cash, and he refused to say anything about whom to go to. Isn't that right?

A. He wouldn't mention the lawyer's name.

Q. And did he mention Mr. Greenstein and Mr. Tobias in that connection and in that conversation?

A. He certainly did.

Q. Did he infer to you they were going to split that cash? Is that what you meant to infer?

A. Well, that was the inference.

Q. That was the inference you got?

A. They were going to render services, yes. I could say that that was an inference I could have drawn.

Q. Did you say to Davis, "You mean you are only going [fol. 184] to give Greenstein, the accountant, $600 out of this fee"?

A. I said to him less than $600.

Q. You thought it should be more?

A. Well, he recommended the case. That is what I said to Davis. I said, "Irving, do you mean to tell me you are going to give Greenstein less than $600 for recommending the case with the cash"——

Q. You didn't see anything wrong in splitting fees with an accountant on a recommendation of a case?

A. Well, if it is a tax case and the accountant has a right to practice in the Treasury Department, I think it is the custom for them to split fees.

Q. Did Greenstein at any time represent these people in any way, to your knowledge?

A. What people?

Q. The Gotham Beef people.

A. Before?

Q. Yes, sir, to your knowledge.

A. No, sir, not to my knowledge.

Q. To your knowledge, did he perform two minutes' work on the Gotham Beef matter?

A. Well, he might have had consultations with——

Q. I said to your knowledge.

A. To my knowledge, he did not. He acted as an escrowee.

* * * * * * * *

Q. You say that you got the inference at the time that you had this further discussion with Davis that Davis and Greenstein and Tobias were going to split this cash among themselves. Is that right?

A. And the lawyer that they spoke about. I didn't say that—I had an idea that that might happen. I had no

knowledge. Davis—will you permit me to answer the question?

[fol. 185] Q. Go ahead.

The Court: Go ahead.

A. Davis told me there really was a lawyer in the case.

Q. Although he hadn't told you his name?

A. No, he wouldn't tell me. Davis kept a lot of things from me.

Q. These people you went to see in the Treasury Department, they would tell you their name, wouldn't they?

A. What people?

Q. The people you say you went to see on the voluntary disclosure.

A. In Washington?

Q. Yes.

A. Yes, and I gave Mr. Davis the names.

Q. I said they would tell you their names, wouldn't they?

A. You mean the attorneys?

Q. Yes.

A. Certainly they would and they did. I asked them for their names. I knew who I was talking to.

Q. Do I understand that so far as Mr. Berman was concerned, you understood that he did not know that Greenstein and Tobias and Davis were going to split this cash?

A. I can't answer that question.

Q. If Tobias was putting on an act and Mr. Davis told you he was putting on an act——

A. Yes, sir.

Q. —did you get any inference from that?

A. From what?

Q. From the fact that Tobias, whom Berman was paying, was putting on an act in front of Berman?

A. I don't know whether Berman was paying his accountants. They were in the same office. I don't know whether he was paying his accountant. I don't know whether they worked for each other. I don't know.

Q. You knew he was his accountant, did you not?

A. I knew he was his accountant.

[fol. 186] Q. He was his representative?

A. Yes, sir.

Q. And he was putting on an act?

A. Davis told me that he was putting on an act.

Q. And that act was not for your benefit, was it?

A. It was not for my benefit, no.

Q. It was for the benefit of Mr. Berman, wasn't it?

A. Apparently. It was probably for the benefit of Mr. Davis too.

Q. You did have an inference then that you drew from that, that they were themselves going to split this cash up unbeknownst to Mr. Berman?

A. Well, I would say that it was possible that they would do it, because I have no doubt—I know—that Mr. Greenstein has split many fees with Mr. Davis.

Q. Cash fees?

A. Yes, cash fees in tax cases, yes, sir.

The Court: How do you know that?

The Witness: They told me that.

The Court: Who told you?

The Witness: I was in the office.

The Court: Who told you?

The Witness: Mr. Davis and Mr. Greenstein.

The Court: All right.

Q. Do I understand that they had not reported those fees?

A. Well, I never examined their income tax returns.

Q. Did you understand that at the time this was told to you?

A. I can't answer that question. I didn't examine their returns.

Q. You previously testified Mr. Schopick came to you and made a complete confession about a lot of fees?

A. Yes, sir, I was very friendly with him at that time.

Q. Did you understand that they had not reported that? [fol. 187] A. They told me they had not reported their cash fees and refused to submit their books, which would prove they didn't report their cash fees for the years 1946, 1947, 1948, 1949, and 1950.

Q. Then you didn't regard Mr. Greenstein very highly after this occurrence?

A. Well, I—it didn't make any difference how I regarded

him. I didn't have any business with him and it was not my duty to be an informer or anything.

Q. All I am asking you is this. You didn't regard him very highly personally after this experience?

A. Which experience?

Q. The experience of the Gotham Beef matter.

A. Well, I had no knowledge at the time of the Gotham Beef matter discussion that he was going to share in the fee.

Q. You had an inference, though, didn't you?

A. Well, just from the fact that they were going to pay a lawyer, and Mr. Davis said that Mr. Greenstein was going to do some work in the case, and besides I certainly thought that he would get more than $360, as he testified, for recommending that kind of a case, where there was a $5,000 fee*t* [*sic*] by check and a substantial amount of money put up in cash.

Q. But the substantial amount of money put up in cash, that didn't result in your having any suspicions at all?

A. I did have a suspicion.

Q. You did have suspicions.

A. Yes, I had a suspicion.

Q. After that, what was your opinion of Mr. Greenstein?

A. Well, I don't think that I had any different opinion than I had before. I didn't regard Mr. Greenstein too highly.

Q. And perhaps he dropped in your regard after this, is that right?

A. Well, I had—I would say yes.

[fol. 188] Q. Do you recall testifying before the Brooklyn Grand Jury?

A. I do.

Q. Do you recall testifying about Mr. Greenstein?

A. I do not.

Q. Incidentally, when was this conversation you had with Mr. Schopick?

A. I think it was the beginning of 1952 when those agent came in.

Q. Certainly, before you testified before the Brooklyn Grand Jury?

A. Oh, certainly, yes.

Q. Now, were you asked the following question and did you make the following answer before the Brooklyn Grand Jury in May of 1952, May 15, to be exact?

"Q. Well, prior to June, 1947, had you done any work in conjunction with the accounting firm of Weisberg & Greenstein? A. Have I done any work for them?

"Q. With them or in conjunction with them. A. Now, let me make this clear, let me say this: Prior to 1947 I might have employed the firm of Weisberg & Greenstein to do some auditing for me. Now if you make your question a little clearer. Let me say I had never worked with them prior to 1947 except in one or two instances where they might have rendered some service to me for a client.

"Q. Well, did anything occur in any of those cases in which they performed these auditing services which could be deemed by you irregular? A No, not at all, sir, not at all. Just plain accounting work. I mean the matters were very, very small. I can't even recall them.

"Q. Well, do you feel that the accounting firm of Weisberg & Greenstein prior to June of 1945, had a good reputation? A. Well, they have always had a good reputation.

[fol. 189] "Q. Do you think they deserved the reputation, the good reputation, prior to June of 1947? A. Well, as far as I am concerned they did. I don't even know now that they did anything irregular to me of my own knowledge.

"Q. Just as far as you are concerned. A. I say that they have always maintained a high reputation, to the best of my knowledge, among banks, lawyers and accountants."

Now, do you recall being asked those questions and giving those answers?

A. I don't recall. Most of the answers are true.

Q. I ask you if you recall?

A. I do not recall.

Q. Do you deny——

The Court: Were you asked those questions and did you give those answers?

The Witness: I don't recall that I was asked those questions.

The Court: You don't recall being asked those questions?

The Witness: I was asked certain questions. I don't recall specifically that they asked me those questions.

Q. Do you deny you were asked those questions and you gave those answers?

A. If the minutes, you have the sworn minutes before you before the grand jury, I will certainly not deny it.

* * * * * * * *

Q. Now, Mr. Berman regarded you as his lawyer, did he not?

A. He regarded Mr. Davis as his lawyer.

[fol. 190] Q. Didn't he regard you as his lawyer, too?

A. I don't think so, no.

Q. Well, will you please characterize the relationship that existed between you and Mr. Berman, if you were his lawyer.

A. Davis was retained in the case, Schopick & Davis were retained in the case through the recommendation of Leo Greenstein, and then Mr. Davis asked me to do some work in the case.

Q. You met the client?

A. He asked me to come down and I met the client, yes, sir. The checks were made payable to Schopick & Davis. I never received any fee at all directly from Mr. Berman or the Gotham people.

Q. Then I take it you feel you didn't owe any allegiance to Mr. Berman?

A. You always owe allegiance to somebody, even if you are not directly the attorney. I was working with Davis. I certainly owed some allegiance to him.

Q. You owed allegiance to Berman because he was your client, was he not?

A. Yes, certainly.

Q. But you suspected that a cash fee was being split up in a fashion unbeknown to Mr. Berman, and you didn't tell him?

A. It wasn't my duty to inform him. I just explained to you, Mr. O'Hara, that I didn't regard myself as being his attorney, that the firm of Schopick & Davis were his attorneys.

Q. Well, then, you owed your allegiance to Schopick & Davis?

A. Well, I owed my allegiance to Schopick & Davis and I wouldn't do anything improper as far as Berman was concerned.

Q. Well, you put their interest above the interest of the client?

A. I didn't put their interest above the interest of the client.

Q. Well, you became suspicious of what had been going on and you said you were suspicious that Berman didn't [fol. 191] know about it.

A. You use the word "suspicion" all the time, Mr. O'Hara. I said I could have drawn an inference.

Q. I believe, Mr. Halperin,——

A. I could have drawn an inference.

Q. I thought you said you drew an inference? Didn't you say you drew an inference?

A. Well, it amounts to that, yes. I drew an inference.

Q. Do you want to change it now?

A. I am not changing anything, Mr. O'Hara. I have no direct proof of anything.

Q. But you say——

A. You might have a suspicion without any proof, and that is just what the situation was here. I couldn't accuse anybody directly of anything.

Q. And it was after that that you took your fee, after you had this inference?

A. Well, I took my fee because I was entitled to it.

Q. You didn't mind continuing to associate yourself in this matter by taking a fee some months later, did you?

A. I didn't see anything wrong.

Q. I didn't ask you that. I said you took a fee months later, is that right?

A. I took the fee when they were paid. They couldn't certainly pay me before they received their fee.

Q. And you took the fee after you had the inference, didn't you?

A. I took the fee after I had the curiosity and the inference, yes.

* * * * * * *

Q. Now, referring to the vault in the Chemical Bank.

A. Yes.

Q. You say you took that vault out to keep papers in [fol. 192] it, is that right?

A. Books, confidential reports, work sheets, papers and so forth, yes, sir.

Q. And it was taken out you say in your own name?

A. It was taken out in my name.

Q. And in the name of your wife?

A. I don't know. I said a card was sent and I think she signed it.

Q. Well, do you recall whether it was an and/or box?

A. No, I do not, but my wife always had access to any vault that I had.

Q. You know the distinction between a deputy and a person who is a joint boxholder, don't you?

A. Yes.

Q. What was the distinction as to this box? Was it a joint box or was she your deputy on it?

A. Well, I say, Mr. O'Hara, any box I had my wife had the right to go in and open it up. So it must have been a joint box.

Q. You could have answered that it was your best recollection——

The Court: Now, let us ask the next question.

Q. Now, Mr. Davis didn't have access to this, did he?

A. No, sir.

Q. Every time Davis needed papers you had to go to the box to get them for him?

A. It happened four or five times, yes. He was busily engaged in a lot of matters and he asked me to do that. The vault was just two blocks away from my office. I used to sit around the office, didn't have too much to do. So I just simply complied with his request. He said his vault was uptown.

Q. It was two blocks away from Davis?

A. I didn't see anything wrong about it.

Q. It was two blocks away from Davis, too, wasn't it?

A. No. Davis had a vault uptown, I think he said.

[fol. 1934] Q. I said it was two blocks away from Davis, too?

A. Yes, that is right.

Q. And if he needed these papers he had to have you go to get them, is that right?

A. That is just what he asked me to do, to open the vault.

Q. And he paid for a new vault?

A. Well, it was taken out of my account and he returned the money to me.

Q. What has his vault uptown got to do with it if you took out a new vault?

A. I didn't say it has anything to do with it.

Q. Well, you mentioned it three or four times. I thought it had something to do with it.

A. He just told me to put these papers in my vault that I maintain in the Chemical Bank for 25 years, and when I saw the papers I said, "Irving, you can't put these papers in my vault. This needs a big box."

Q. Incidentally, you testified yesterday that your vault would hold plenty of cash. I assume you had occasion to test it in that respect?

A. I never had any cash in the vault in my life, never, not a single dollar. I never dealt in currency or cash.

Q. And you didn't think much of people who did, is that it?

A. Well, it all depends. If they are evading their taxes, I wouldn't think much of them, no.

Q. As I understand, in the Pattullo Modes case, you went to Washington and you saw Bill Davis?

A. Yes.

Q. And you saw various other people in the Treasury Department, is that right?

A. Yes, sir.

Q. Do you know where you went in the Treasury Department to see these people?

A. In the general counsel's office.

Q. Do you recall the floor?

A. I certainly wouldn't—no, I wouldn't recall that.

[fol. 194] Q. How many occasions would you say you went into the Treasury Department?

A. Several times.

Q. Now, you were interested, you say, in endeavoring to find out what a certain policy was, is that correct?

A. Correct, yes, sir.

Q. And I assume also you were interested, if you could get someone to say that a policy existed, that it was in accordance with your facts, that you wanted to be sure who that person was, didn't you?

A. I wanted to be sure who that person was, didn't you?

A. I wanted to be sure who what person was?

Q. Who informs you of this fact.

A. Certainly, that is correct.

Q. I believe you testified when you were down there, you found out about the Wenchel definition?

A. Yes, he laid down a policy.

Q. And you had not known about that before you went down there?

A. I had no personal knowledge of it, no.

Q. And you understood this was something that was interdepartmental, that you had to go to the department to find out?

A. Well, I thought that was the best place to find out what the viewpoint of certain men in the department were. I have always found it expedient and practical and sensible to get information—sometimes you can get more information going into a Government bureau than you can get from books.

Q. And no one asked you for your Treasury card when you were there?

A. No, sir.

Q. No one asked you the name of the case?

A. No, sir.

Q. You did not disclose the name of the case?

A. I did not.

Q. And these people freely discussed with you the policies and doctrines of voluntary disclosure. Is that right?

[fol. 195] A. They were very gracious and very willing to discuss it and very nice about it, and they didn't even hurry me. They just kept on talking, and I asked them

questions and I made a memorandum of it when I left, naming the people whom I spoke to.

Q. As a matter of fact, the Wenchel definition of voluntary disclosure was right in the Commerce Clearance of Prentice Hall's Tax Service at this time, was it not?

A. I don't know.

Q. But you never looked there?

A. No. Davis probably didn't look there either. He asked me to go down and find out about it.

Q. At this time, Mr. Saver was in the case, wasn't he?

A. Yes, Mr. Saver was in the case.

Q. Mr. Schwaeber was in the case?

A. I don't know about Schwaeber. I heard the name of Saver. He was a member of the firm I suppose.

Q. Mr. Saver had just shortly before been in the criminal division of the Attorney General's office in Washington?

A. He was an assistant Attorney General.

Q. And you understood he was experienced in the trial of tax matters?

A. Yes.

Q. And that he was thoroughly versed in tax law, is that right?

A. Well, I don't know whether he was versed in tax law in the technical sense. I knew he can try a tax case. Where a person was charged with evading taxes, he tried cases of that character. I don't know whether he was an expert tax man.

Q. You were not versed in the tax law. Is that right?

A. No, I was not.

Q. As a matter of fact, when you read that memorandum that Mr. Davis gave you, you said it didn't mean anything to you. Isn't that right?

A. What memorandum?

[fol. 196] Q. Exhibit No.

A. You mean that went to Oliphant?

Q. That yellow——

A. First I would like you to show it to me.

Q. Surely.

A. I didn't say it didn't mean anything to me. I can read up law and look up cases and analyze a case. I think I can do that and distinguish one case from another, but I

don't know whether I paid any particular attention to that problem at that time.

Q. You know the memorandum I am referring to now (handing).

A. Yes, I referred to that. That is the memorandum he gave me before I met Mr. Marks.

Q. When you read that yesterday, you didn't testify that that didn't mean anything to you?

A. No, I didn't refer to that. I was referring to a brief that Mr. Steve Gross prepared in Mr. Davis' office on the Smith case.

Q. Do you recall this question and answer from yesterday, Mr. Halperin:

"Q. After you got this paper, did Mr. Davis have anything more to say about it?"

And I say to you the paper referred to is the same paper you have now before you——

"A. Well, I said to him, after I read it, 'It don't mean too much to me.' I said, 'Sayer will understand all that.'

A. That is correct, Mr. O'Hara.

Q. And you knew that Sayer understood all this?

A. Yes, sir, I did. I said that.

Q. And he had just recently *recently* [*sic*] returned from Washington, after serving there in an official capacity. Is that right?

A. Well, when was that? I think he came down a while before that.

Q. You mean came up here to New York a while previ- [fol. 197] ous to that?

A. Yes, I don't know how many months or anything like that.

Q. You were the man, however, that they sent to Washington to find out about voluntary disclosure?

A. That is right.

By the Court:

Q. How many times had you been in the Treasury Department building for conferences in Washington?

A. Well, just this time and also when I went to see Mr. Oliphant.

Q. Just twice in your life?

A. Two or three times.

Q. When you went in there, was there a receptionist there who took down your name?

A. There was a secretary there, yes.

Q. Did she ask yc . your name?

A. I have no recollection as to that.

Q. Ask what matter you were down there to talk about, what case it was about?

A. They did not.

Q. Ask what firm you came from?

A. No, sir.

Q. Ask if you had a Treasury card?

A. No, sir.

(Government's Exhibit 80 marked for identification.)

The Witness: And I was not asked to show my card when I saw Mr. Oliphant either.

Q. But you went to the general counsel's office without any appointment with any individual, I take it?

A. You mean the first time?

Q. Yes.

A. I just went in cold turkey. I have done that many times with other Government bureaus.

Q. Not in the Treasury Department?

A. Maybe not in the Treasury Department. There are other departments where I go in and I would get informa-[fol. 198] tion. I was not practicing. I was just trying to get information. I was not arguing in any case.

By Mr. O'Hara:

Q. Did you talk to a various number of people there, more than one there?

A. Yes, sir. Mr. O'Hara——

The Court: Well, you have answered the question.

The Witness: No, just a moment. I want to make a suggestion, if I may.

The Court: No, you answer the questions.

Q. You talked to several people. Is that right?

A. That is right.

The Court: Mr. O'Hara has been apparently ask- a question from a record or transcript of something that happened in 1926, and he asked the witness whether a certain question was asked and an answer given by that witness in that proceeding. The witness, as I recall it, said he couldn't remember.

I have suggested to Mr. O'Hara that before pursuing that line of inquiry any further, he should identify the proceeding in some way so that the witness might know wherein he was supposed to have testified.

[fol. 199] Mr. O'Hara: Your Honor, the situation is a little bit delicate in this sense. The testimony was taken in connection with an application for a card to practice before the Treasury Department. Mr. Halperin had at that time, or very shortly before, been under indictment——

Mr. Singer: Now, just a minute. You don't stick anything in this record that has anything to do with it. You can't do it in the absence or the jury or anywhere. We will not have such nonsense. I want that physically expunged from this record, and I won't take it any other way except by moving right now to have all of this——

The Court: This is in the absence of the jury.

Mr. Singer: That doesn't alter the fact. You can't load the record with irresponsible, absolutely deliberately put-in matters.

The Court: I don't know whether it is deliberate, Mr. Singer.

Mr. Singer: Of course it is.

Mr. O'Hara: My concern is simply this——

Mr. Singer: You are concerned about it?

Mr. O'Hara: I am concerned about it, because I don't want that matter mentioned except as an application before the Treasury Department, and I, therefore, have been very careful.

Mr. Singer: Then why did you need to put that part in?

The Court: Now, Mr. Singer,——

Mr. O'Hara: I was somewhat reluctant——

Mr. Singer: It is all right to keep pounding the desk, your Honor, but I am as human as anybody else, and no-

body has a right to do things—unless you want me to ab-
[fol. 200] solutely go right out of here—I cannot tolerate anybody doing anything so absolutely wrong.

When a man says to you that it is necessary to tell you that because a man was once indicted and there was a proceeding, that that has anything to do with the nature of the proceeding at this time——

The Court: Mr. Singer, as I understand it, Mr. O'Hara was saying that this proceeding was in connection with an application for a Treasury card, and the fact of the indictment might come out if that came out, and he didn't want that brought out.

Mr. O'Hara: It is replete all through this, and I wanted to be very careful in connection with the proceeding to not in any way identify it, and I also intend to produce another document here, where that may be referred to, I do not wish to, nor do I intend that the document should be put in evidence, but I do need that document to ask another question apart from that particular matter.

In case somebody says, "Offer this in evidence" I want it known that I have no intention of offering anything in evidence of that nature.

The Court: Is the only purpose that you are asking this question to impeach the witness on the testimony that he previously gave about the extent of his practice?

Mr. O'Hara: That is the only reason, of course.

The Court: Under those circumstances, I don't think it is sufficiently material to take that chance.

[fol. 201] Mr. O'Hara: I was going to drop it when you asked me to further identify it because I was satisfied——

The Court: My suggestion is that it be dropped and that it not go any further.

Mr. Singer: May I respectfully make a suggestion? Your Honor will note that I never made any objection with respect to this 1926 incident with respect to the nature of the document from which he was reading or its authenticity. I never made any objection based upon a lack of foundation, realizing, without having direct knowledge, that there might be such a thing. But I do feel between us that as lawyers and men, all of this colloquy should be physically expunged from the record, and we ought to start fresh as if it had not happened.

The Court: I can't strike something physically from the record because this is not before the jury. Mr. O'Hara has explained his position——

Mr. Singer: But it is in a record——

The Court: —and you have explained yours, and I have suggested to Mr. O'Hara that the inquiry about that matter, since it does not seem to me to be particularly material to the main issues in the case, be not pursued further and that it be dropped.

Mr. MacMahon: We just wanted to tell your Honor that in response to your request, we identified it.

Mr. O'Hara: Frankly, the witness is sometimes not responsive, in my opinion, and I didn't want him to interject something in this, and I ask Mr. Singer to speak to him so that it does not get into the record under any circumstances.

[fol. 202] The Court: If the witness interjects it, there is nothing I can do about it.

* * * * * * *

Q. After the break-up of the law firm of Schopick & Davis—and you recall the fact that they split up, do you not?

A. Yes, sir.

Q. Did you see Mr. Hoffman periodically after that?

A. Oh, yes, there were times he came up to the office.

* * * * * * *

Q. After that, did you and Davis, Hoffman and Schopick together hire counsel to represent you jointly?

A. Yes, that is correct, too. You don't want to know the reason for it, do you?

The Court: Your counsel can bring it out.

* * * * * * *

Q. Do you deny that you were at the Washington Hotel with Schopick, Davis and Hoffman in April of 1953?

A. I can't deny it because I don't remember it.

Q. And on direct examination didn't you say, at least on four occasions that you were never in the Washington Hotel with Hoffman at any time?

A. Well, that was my recollection, and I don't change it right this minute.

Q. Then you do deny that you were there with Hoffman in April 1953?

A. I don't deny that I was with Hoffman at the Washington Hotel in 1953.

fol. 203] Q. Yet your categorical statement on direct was that you were never in the Washington Hotel with Hoffman. Is that right?

A. To the best of my recollection, that is so right now.

Q. But you don't deny you were there in April 1953.

* * * * * * *

Q. Mr. Marks testified that you told him that your friend in Washington would bring Pattullo Modes tax case to a satisfactory conclusion. You say that never happened?

A. Never happened, no, sir. I never had such a conversation with Marks.

Q. Mrs. Segel testified that after $100,000 in cash had been put up for some weeks she had a conference with you at which time you, Halperin, told her that all the arrangements had been made, that the no-prosecution deal would go through, they had to wait until the proper time to get it through, but there was no doubt it would be accomplished. Do you say that never happened?

A. Positively not. I never had any such conversation with Mrs. Segel.

Q. Mr. Berman testified that you told him your friend in Washington wanted $100,000, was not going to use up his favors unless he was paid a good-sized fee. You say that never happened?

A. I say it never happened.

Q. Mr. Tobias testified that you, Halperin, told Berman he was making a mistake in not agreeing to a price of $65,000, that the man in Washington had come down considerably. Do you say that never happened?

A. No such discussion ever took place.

Q. Mr. Greenstein testified he went with you to a vault [fol. 204] at the Trade Bank and you took out a package which you and he both had been told was a cash fee and that you went away with that package. Do you say that never happened?

A. I say that that is a fabrication. It never happened. I never was with Greenstein when he took the package out.

Q. When Mr. Hoffman testified that you Halperin and he took $100,000 to Washington to deliver to Henry Grunewald, do you say that that never happened?

A. It is a big lie. I never happened.

Q. When Mr. Davis testified that you took him to the Munsey Trust Building to meet Grunewald, at which time he thanked Grunewald in your presence for reducing the price to $100,000, do you say that never happened?

A. That is a fabrication. It never happened. Mr. Davis never was at the Munsey Building with me.

Q. When Joseph Greenberg, the accountant, testified that you, Hoffman and Davis came to his office when Mr. and Mrs. Glover were present and that you said you had a Washington contact to handle the Glovers' tax case, and that that would involve additional cash fees, do you say that never happened.

Mr. Singer: Would you refer me to the page?

(Last question read.)

Mr. Singer: That is a proper summary of the testimony.

Q. Do you say that never happened?

A. Never happened. I never discussed any money with Mr. Greenberg.

Mr. O'Hara: That is all.

[fol. 205] Re-direct Examination.

By Mr. Singer:

Q. Now, do you remember that you appeared before the grand jury in Brooklyn for the first time—well, will you accept the record as you did Friday?

A. I will.

Q. On March 13, 1952?

A. Yes, sir.

Q. And on March 14, 1952?

A. Yes, sir.

Q. And that at both of those times you had not yet retained me?

A. I hadn't retained you up to that time.

Q. According to this record, again on April 24th. Then you were directed to return again on April 28, 1952?

A. Yes.

Q. That is what the record shows?

A. Yes, sir.

. . . . . .

Q. Now, were you asked this question, and I am reading from page 1061:

"Q. Were you aware that any witness has ever made that statement about you—the fact that you brought money to Washington and gave it to Henry Grunewald?"

And you answered that you refused to answer on the ground that the question might tend to incriminate you.

Will you rely on the record as being accurate in that regard?

A. I certainly do.

. . . . . .

[fol. 206] Q. Now, do you remember being recalled on May 15th I think, page 1311 and you were asked if you knew the firm of Sports & Casuals Corporation and you answered:

"I do not."

Was that true?

A. That was true.

Q. Then they asked you whether you knew a Mr. Weissberg of some——

A. Clothing company.

Q. —clothing firm, and you said you met him, he is not a client of yours. Do you remember that?

A. Yes, I remember saying that.

Q. Then they asked you if you had done any work for him and you said you had never done any work. Was that correct and true?

A. Yes.

Q. Then they asked you about the Wear Best Coal [*sic*] Company and you said you hadn't done any work for them. Was that right?

A. That is right.

Q. Then, Albert Dan: Did you say you had never done any work for him?

A. That is right.

Q. Then you were asked if Mr. William Weissberg had made any cash payments to the firm of Schiopick & Davis or any of the members, excluding yourself and you said not to your knowledge. Was that true?

A. Yes, that was true.

Q. Then you were asked whether a Mr. Albert Dan had made any cash payment to the firm of Schopick & Davis and you said to your knowledge no?

A. Yes, that is correct.

Q. Was that true then?

A. It was true.

Q. And is it true today?

A. Yes.

Q. Then you were asked about the Sheila Lingerie Corporation, and you said you hadn't heard of it. Was that correct?

A. That was correct.

[fol. 207] Q. And they asked you about a Miss Franz Coat Corporation and a Mr. Terrens and you said you didn't know them. Do you remember that?

A. I do, and I didn't know them.

Q. Charles Horwitz or Philip Reich, or Leon Callich, and you said you had never done any work for those people?

A. That is correct.

Q. Or a Miss Stephanie. You were asked here in substance——

Mr. O'Hara: Your Honor, on this one I would like to have the question.

Mr. Singer: I am trying to find it. I will find it again.

Q. Now, Mr. Halperin, when you were before the grand jury in Brooklyn did you exercise your claim of privilege in good faith?

A. I certainly did.

[fol. 208] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1956

Nos. 183, 184 and 186

HENRY W. GRUNEWALD, Petitioner,

vs.

UNITED STATES OF AMERICA;

MAX HALPERIN, Petitioner,

vs.

UNITED STATES OF AMERICA; and
DANIEL A. BOLICH, Petitioner,

vs.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed October 15, 1956

The petitions for writs of certiorari to the United States Court of Appeals for the Second Circuit are granted limiting the questions to those enumerated below:

(a) No. 183

"1. Whether conviction of a conspiracy to procure from the Fraud Bureau of the Internal Revenue Department a decision not to prosecute a tax fraud, where the object of the conspiracy had been accomplished by January, 1949, and prosecution was barred under the statute of limitations by January, 1952, may be sustained, on the theory that the conspiracy must have included a continuing agreement to conceal—the indictment having been found October 25, 1954, and the proof being that one or more of the conspirators in March, 1952, attempted to cover their tracks from investigators.

2. Whether independent acts of alleged conspirators, after the accomplishment of the object of the conspiracy and done without the knowledge or the participation of the petitioner Grunewald, may suffice to support a charge

against him that the original conspiracy included a continuing purpose to conceal so that the conspiracy might be deemed to extend down to the last act of concealment.

3. Whether an alleged continuing conspiracy to conceal could be found as to the petitioner Grunewald, when he was concerned only with the original object of the conspiracy and was acquitted by the Trial Court on three counts of attempting to influence witnesses, which the Court charged the jury could be acts of continuing concealment.

4. Whether a purpose to continue to conceal the accomplishment of the primary conspiracy may be inferred from the fact that the conspirators would be presumed to know that their activities would always be open to investigation —whether a subordinate conspiracy to conceal may be implied from the original crime.

[fol. 209] 5. Whether the Trial Court committed error in permitting the jury to find a continuing conspiracy to conceal from the fact that, more than three years after the object of the conspiracy had been accomplished, the petitioner Grunewald, when his secretary was subpoenaed before a grand jury, told her she need not answer various questions and could say she forgot.

6. Whether the Trial Court committed error in permitting the defendant Halperin, the only witness for the defense, to be cross-examined, for the purpose of impeaching his credibility, on the fact that he had been, prior to the trial, subpoenaed before a grand jury and had there claimed his constitutional privilege against self-incrimination on a long line of questions. The constitutional privilege thus infringed is that part of the Fifth Amendment which reads " * * * nor shall be compelled in any criminal case to be a witness against himself, * * * ?"

No. 184

"1. When a defendant testifies in his own defense at his trial, and his answers to questions show that, although averring his innocence, he was justified in invoking the Fifth Amendment with regard to like questions before a Grand Jury—as in this case all agree—is not that defend-

ant denied due process when the Government on cross-examination brings out before the trial jury, the fact that he refused to answer the questions before the Grand Jury, upon such constitutional grounds?

2. When a defendant has been subpoenaed to testify before a Grand Jury in an investigation, of which he is a primary target, has claimed his Constitutional privilege, advised the Grand Jury that he was doing so as an innocent man ensnared in suspicious circumstances and because he could not cross-examine or be represented by counsel, may the trial court charge the jury that they may consider his refusal to testify before the Grand Jury on the score of his credibility, although his trial testimony was entirely consistent with his position before the Grand Jury?

3. Under the circumstances surrounding a defendant's appearance before a Grand Jury as set forth in the last preceding paragraph, does not the Court's instruction as aforesaid illegally impeach and impede the defendant's statutory right to be a witness on his own behalf?

4. Does the rationale of Raffel v. United States, 271 U. S. 244, apply to prior invocation of the Fifth Amendment before a Grand Jury as distinguished from such action at a prior trial?

5. Does not the doctrine and rationale of Slochower v. Board of Higher Education, decided by this Court April 9, 1956, compel the conclusion that a defendant under the circumstances aforesaid, is denied due process of law when he is examined by the Government and compelled to admit that he refused to answer questions before the Grand Jury, and the Trial Court advises the jury they may consider that refusal on the subject of his credibility?

[fol. 218] 6. Is not a defendant, particularly one who asserted that he was invoking the Fifth Amendment as an innocent man being plotted against and beset by suspicious circumstances entitled to have the jury charged, 'An innocent man may honestly claim his answers may tend to incriminate him'?

8. Does not the opinion of the Court of Appeals that the statute of limitations against conspiracy was not tolled, in that certain overt acts of concealment when committed

were chargeable to the original conspiracy disregard and deny effect to this Court's views on proof of subsidiary concealment conspiracies, as set forth in Krulewitch v. United States, 336 U. S. 440, and Lutwak v. United States, 344 U. S. 604?

9. Does not the conclusion of the Court of Appeals herein that a single conspiracy rather than a multiplicity of conspiracies are disclosed by the record, run counter to this Court's decision in Kotteakos v. United States, 328 U. S. 750?"

No. 186

"1. Whether the three year Statute of Limitations, applicable to the charge of conspiracy, barred conviction of the petitioner Bolich inasmuch as the objective of the alleged conspiracy had been achieved by January, 1949—more than five years before the date of the indictment which was filed on October 25, 1954.

2. Whether multiple conspiracies were established by the evidence, rather than a single general conspiracy, to the substantial prejudice of the rights of the petitioner Bolich.

6. Whether the trial Court committed prejudicial error in permitting the government to elicit from the defendant Halperin upon his cross-examination that he had invoked the Fifth Amendment at a Grand Jury hearing and the trial Court charged the jury that they might consider Halperin's claim of constitutional privilege as adversely affecting his credibility."

A total of two hours will be allowed for argument on these questions.

(b) No. 184

"7. Does it constitute due process to subpoena a person to testify before a Grand Jury in an investigation of which he is a primary target, and thereby permit an examination before trial of a *de facto* defendant?

11. Does a lawyer who advises a witness to plead the Fifth Amendment where the witness is justified in doing so become guilty of corruptly endeavoring to influence the witness merely because the interposition of the Constitu-

tional privilege might also serve to protect the person giving the advice?''

A total of one hour will be allowed for argument on these questions.

[fol. 211] And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

HENRY W. GRUNEWALD,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioner respectfully asks for a writ of certiorari to the Court of Appeals for the Second Circuit to review a judgment of that Court affirming a conspiracy conviction in the District Court for the Southern District of New York. Convicted with him were two co-defendants, Daniel A. Bolich and Max Halperin. The latter two were also convicted on other counts. The affirmance was originally unanimous as to petitioner, but divided as to co-defendant Halperin. On petition for rehearing, one judge dissented and voted to reverse as to all defendants.

Opinions.

The majority and first dissenting opinions of the Court of Appeals were filed April 10, 1956 and are not yet officially reported, but appear in volume V appendix, pages 288a to 357a. A further dissenting opinion was written by

Judge Frank on a petition for rehearing and appears at pages 380a to 393a of volume V appendix.

Jurisdiction.

The judgment of affirmance was dated and entered April 10, 1956. A petition for rehearing, duly filed on April 20, 1956 and submitted April 24, 1956, within the fifteen day period allowed therefor by Rule 25 of the Court of Appeals Rules, was denied, one judge dissenting, by order dated and entered June 1, 1956. Judge Frank, who had originally concurred in affirmance of petitioner's conviction, revised his position to dissent from such affirmance.

Jurisdiction of this Court to review is granted by Section 1254 (1) of Title 28 U. S. C. A. and Rule 37 (c) of the Federal Rules of Criminal Procedure.

Questions Presented.

1. Whether conviction of a conspiracy to procure from the Fraud Bureau of the Internal Revenue Department a decision not to prosecute a tax fraud, where the object of the conspiracy had been accomplished by January, 1949, and prosecution was barred under the statute of limitations by January, 1952, may be sustained, on the theory that the conspiracy must have included a continuing agreement to conceal—the indictment having been found October 25, 1954, and the proof being that one or more of the conspirators in March, 1952, attempted to cover their tracks from investigators.

2. Whether independent acts of alleged conspirators, after the accomplishment of the object of the conspiracy and done without the knowledge or the participation of

the petitioner Grunewald, may suffice to support a charge against him that the original conspiracy included a continuing purpose to conceal so that the conspiracy might be deemed to extend down to the last act of concealment.

3. Whether an alleged continuing conspiracy to conceal could be found as to the petitioner Grunewald, when he was concerned only with the original object of the conspiracy and was acquitted by the Trial Court on three counts of attempting to influence witnesses, which the Court charged the jury could be acts of continuing concealment.

4. Whether a purpose to continue to conceal the accomplishment of the primary conspiracy may be inferred from the fact that the conspirators would be presumed to know that their activities would always be open to investigation—whether a subordinate conspiracy to conceal may be implied from the original crime.

5. Whether the Trial Court committed error in permitting the jury to find a continuing conspiracy to conceal from the fact that, more than three years after the object of the conspiracy had been accomplished, the petitioner Grunewald, when his secretary was subpoenaed before a grand jury, told her she need not answer various questions and could say she forgot.

6. Whether the Trial Court committed error in permitting the defendant Halperin, the only witness for the defense, to be cross-examined, for the purpose of impeaching his credibility, on the fact that he had been, prior to the trial, subpoenaed before a grand jury and had there claimed his constitutional privilege against self-incrimination on a long line of questions. The constitutional privilege thus infringed is that part of the Fifth Amendment

which reads: "* * * nor shall be compelled in any criminal case to be a witness against himself * * *".

7. Whether the Trial Court committed error in allowing the government, on redirect examination of its chief witness, an admitted perjurer, to bolster his credibility by showing that, three years prior to the trial, in an attempt to make a deal for immunity, he had authorized his attorney to make a hypothetical statement concerning the same facts testified to on the trial—on the theory that this was a prior consistent statement made before any motive to fabricate existed.

Constitutional Provision and Statutes Involved.

Fifth Amendment.

"* * * nor shall be compelled in any criminal case to be a witness against himself * * *."

Section 371, Title 18 U. S. C. A.

"371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Section 3282 Title 18 U. S. C. A.

(As applicable to offenses prior to 1954 amendment.)

"3282. *Offenses not capital.*

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished

for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed. June 25, 1948, c. 645, 62 Stat. 828."

Statement of the Case.

Grunewald was convicted in the Southern District of New York of conspiracy under Section 371, Title 18 U. S. C. A. and sentenced to five years and $10,000 fine (Grunewald Appendix, pp. 2-3). Bail pending appeal was granted by the Trial Judge (Grunewald Appendix, p. 2). Bail was continued by the Court of Appeals, Second Circuit, pending this application.

The original decision of April 10, 1956 affirmed unanimously as to Grunewald, but Judge Frank filed a dissenting opinion as to co-defendant Halperin, on the ground that his constitutional rights were violated by improper cross examination, tending to affect his credibility. Judge Frank held the error fatal on the ground that Halperin, if believed, could reasonably have been acquitted.

Since Halperin was the one claimed by the government to have made all the arrangements with Grunewald and since he testified for the defense and vigorously disputed the charge, any error as to him necessarily affected Grunewald also.

On petition for rehearing, denied June 1, 1956, Judge Frank dissented as to all defendants on the ground that the Statute of Limitations would have required acquittal on the theory on which the case was submitted to the jury and voted for a new trial.

The indictment was in seven counts (Grunewald Appendix, pp. 5-19). The first count, on which alone the petitioner Grunewald was convicted, charged a conspiracy

of numerous persons to defraud the United States in the administration of the revenue laws and to influence witnesses before a congressional investigating committee and before a grand jury and it was said to be a part of the conspiracy that continuing efforts would be made to avoid detection by any governmental body, whether executive, legislative or judicial.

Grunewald was not a defendant on the second count. The third and fourth counts are not material here. The Trial Court dismissed one and granted acquittal on the other. The fifth, sixth and seventh counts charged attempts to influence witnesses in March, 1952. The Trial Court acquitted Grunewald on these counts (Grunewald Appendix, p. 583).

The charge arose out of the disposition of two tax fraud cases which were being investigated in 1948 by the Fraud Bureau of the Internal Revenue Department (Grunewald Appendix, pp. 287-8, 430). One was known as the *Pattullo Modes* case and the other as the *Gotham Beef* case. Both concerns were represented by the New York law firm of Schopick & Davis (Grunewald Appendix, 303, 317-18). The defendant Halperin had office space with this firm and was known to be a good friend of Henry Grunewald, who was, in turn, known as a man of influence in Washington and a friend of Bolich (Grunewald Appendix, p. 312), who, until September 1, 1948, was the agent in charge of the New York office of the Fraud Bureau and thereafter was Assistant Commissioner of Internal Revenue (Grunewald Appendix, pp. 475-6).

The government's case is shown in the testimony of Davis. He said that he asked Halperin to get help in each case from Grunewald (Grunewald Appendix, pp. 311-12, 315-16); and that Halperin told him Grunewald wanted

$100,000.00 in the *Pattullo Modes* case and $60,000.00 in the *Gotham Beef* case (Grunewald Appendix, pp. 330, 325). The *Gotham Beef* case ruling that there would be no prosecution came down in October, 1948 and Davis testified that $60,000.00 in cash was turned over to Halperin at that time to give to Grunewald (Grunewald Appendix, pp. 327-8). The *Pattullo Modes* case ruling that there would be no prosecution came down on January 10, 1949 and Davis testified that $100,000.00 in cash was turned over on the 12th of January to Halperin for Grunewald (Grunewald Appendix, pp. 333-5).

The object of the conspiracy was expressed by the Davis clients as follows:

Mr. Marks (*Pattullo* case, Grunewald Appendix, p. 30):

> "He says all he could promise was that there would be a memorandum put into our file that the case was to be settled on a civil basis."

Mr. Tobias (*Gotham Beef* case, Grunewald Appendix, p. 167):

> "Now, the exact terms of the escrow * * * was * * * that until I were to have heard with my own ears from the special agent's office from a responsible official there that was to be no criminal prosecution in the Gotham matter, * * * the money was not to be released."

Both of these objects were fully accomplished by January, 1949 and prosecution was barred by January, 1952.

In August, 1951, a congressional committee inquiring into tax matters, subpoenaed the Pattullo Modes people, but they claimed their privilege (Grunewald Appendix, p. 47).

In March, 1952, a grand jury in the Eastern District of New York, inquiring into the *Pattullo Modes* case and the

Gotham Beef case, subpoenaed the Pattullo Modes people and the Gotham Beef people (Grunewald Appendix, pp. 78, 116, 151). Davis and Halperin had talks with these prospective witnesses in March, 1952, which the government charged in the fifth, sixth and seventh counts were designed to persuade the witnesses to remain silent (Grunewald Appendix, pp. 47-49, 151). Halperin was also subpoenaed before this same grand jury, but claimed his privilege on all the matters in issue (Grunewald Appendix, pp. 694-717). A part time secretary, who had worked for Grunewald in Washington during the last half of 1949 and during the last half of 1950 and knew nothing about these tax cases, was also subpoenaed to this grand jury, although not actually called before it as a witness. She testified that before she came up, Grunewald told her she did not have to testify about his personal affairs and could say she forgot (Grunewald Appendix, pp. 536-42).

The direct evidence relied upon to connect Grunewald with the original conspiracy was testimony of Davis that he met with Grunewald and Halperin on one occasion in October, 1948 in Washington at which time Halperin said that Grunewald had agreed to accept $100,000.00 in the *Pattullo* case, whereupon Davis thanked him and Grunewald said, "O. K., O. K." (Grunewald Appendix, p. 330).

The indictment was found October 25, 1954 (Grunewald Appendix, p. 1).

Argument.

1. Statute of Limitations. All parties agreed that the three year statute of limitations found in Section 3282, Title 18, U. S. C. A. was applicable to the conspiracy charge. The change of this limitation to five years did not occur until September, 1954. The prosecution for a con-

spiracy to procure the two no-prosecution decisions would, therefore, have been barred by January, 1952. To avoid this, the government added to the conspiracy charge the element of a continuing agreement to conceal. This theory was sustained by the Trial Court and the Court of Appeals. The majority opinion below says, concerning the issue of the statute of limitations: "This is an interesting and important question, seemingly one of first impression."

We contend that the question was not of first impression, but had been essentially answered in our favor by the decisions in this Court in *Krulewitch* v. *United States*, 336 U. S. 440 and *Lutwak* v. *United States*, 344 U. S. 604.

It was conceded by the government at the trial that the only overt acts relied upon within the period of three years before the filing of the indictment were alleged acts of concealment (Grunewald Appendix, p. 579). The acts relied upon occurred in February and March, 1952, during the grand jury investigation, and are set out in the Trial Court's charge (Grunewald Appendix, pp. 750-1). The result is that, from the fact that individual acts of covering up may have occurred after the statute of limitations had run, the jury was permitted to find an original and continuing conspiracy to conceal.

In his second dissenting opinion in the Court below, Judge Frank said:

> "And here if—as the jury may well have found—the conspiracy ended in 1949 (when Bolich promised the taxpayers immunity from tax evasion prosecution if they confessed and when they then confessed), the record contains no evidence, other than overt acts of concealment, reasonably warranting an inference of an agreement to conceal as part of the conspiracy. • • • If the charge here is sustained, then the statute of limitations in conspiracy cases could be suspended indefinitely by an act of conceal-

ment by any of the conspirators at any time, so long as the jury found that the mere existence of a conspiracy implied an agreement to conceal it.

This will not do, in the light of *Krulewitch* v. *U. S.*, 336 U. S. 440, 444."

In the *Krulewitch* case, this Court rejected the theory that a conspiracy to conceal would be implied from the very fact that criminals, naturally, must do their best to conceal in order to escape punishment. In the *Lutwak* case, where the conspiracy to conceal was alleged in the indictment, this Court held that acts of concealment, when the matter came under investigation some years later, did not suffice to prove an original conspiracy to conceal. This Court said, 344 U. S. at page 616:

> "This is not evidence that the conspiracy included the further agreement to conceal. It is in the nature of an afterthought by the conspirator for the purpose of covering up.".

And the Court repeated its comment about implicit conspiracy made in the *Krulewitch* case as follows:

> "We are not persuaded to adopt the government's implicit conspiracy theory, which in all criminal cases would create automatically a further breach of the general rule against the admission of hearsay evidence.".

In the *Lutwak* case, the particular admission of evidence complained of was sustained on another ground, but even from this ruling three Justices of this Court dissented. In such dissenting opinion, the doctrine of implied secondary conspiracy to conceal was discussed and it was said, page 622:

> "This revival of the long discredited doctrine of constructive conspiracy would postpone operation of

> the statute of limitations indefinitely and make all manner of subsequent acts and statements by each conspirator admissible in evidence against all.".

The Court below argued that there was a campaign of concealment shown in the details of the charges against Halperin in Counts 5, 6 and 7. Yet, the petitioner Grunewald was acquitted of any complicity in those acts.

The Court below also argued that there was a conspiracy to conceal because "These appellants must have known from the outset that the success of their enterprise was in real danger at all times * * *." Thus, the Court below goes back to the theory of implied conspiracy, which was rejected in the *Krulewitch* case, and relies upon independent acts of covering up, long after the original conspiracy and of which this petitioner was acquitted, to establish both an original and a continuing conspiracy to conceal. If this be right, then the statute of limitations has been abolished and, so long as any conspirator makes any effort to conceal, every conspirator remains continuously liable to prosecution.

Illustrating further the errors in such a course, is the action of the Trial Court in submitting to the jury the question whether Grunewald's conversation with his secretary in 1952 could be found to be an overt act of concealment. The girl had not been around in the days of the *Pattullo Modes* and *Gotham Beef* cases. She had worked for Grunewald for the last half of 1949 and the last half of 1950. Grunewald's comment when she was subpoenaed, that she did not have to answer questions about his personal affairs and could say she forgot, was obviously nothing more than his spontaneous objection. Yet, the Court gave the jury the right to find the existence of a continuing conspiracy based upon that particular incident (Grunewald

Appendix, pp. 750-1). Specific exception was taken and overruled (Grunewald Appendix, pp. 778, 784).

The theory on which the majority of the Court of Appeals affirmed the conspiracy conviction was that the object of the conspiracy was to guarantee the taxpayers against prosecution at any time until the same was barred. Judge Medina put it this way:

> "What the fixers had to sell was freedom from criminal prosecution for tax frauds. What the taxpayers bargained for was protection from a tax evasion prosecution. * * * The six-year Statute of Limitations (26 U. S. C. [1940 Ed.] Section 3749) did not run in favor of the taxpayers until some time after the commission of the overt acts relied upon."

So, the Court continued, they had to conceal after January, 1949, to prevent the undoing of their work.

The trouble with this theory is that:

(1) The factual premise is wrong to start with—in both tax cases the object was precisely stated to be to obtain a particular ruling (see *supra*, p. 7). There was no general or extended guarantee against prosecution.

(2) It implies an original and continuing agreement to conceal from a necessity to keep the crime from being discovered, which is exactly what this Court said in the *Krulewitch* case could not be done.

(3) It tries to avoid the *Krulewitch* case and *Lutwak* case by first extending the scope of the conspiracy to a blanket protection to run until the tax prosecution is barred and then says that, on that theory, the subsequent acts of concealment (conceded by the government to be the only acts within three years prior to this indictment [Grunewald Appendix, p. 579]) are within the period of the original

conspiracy and so may serve as ground for an inference that the original conspiracy included an agreement to conceal.

(4) No such theory was submitted to the jury. On the contrary, the Trial Judge (following the indictment) submitted the case on the question whether, even though the original purpose of the conspiracy was accomplished when the no prosecution rulings were obtained, there was included in the conspiracy an agreement to avoid detection of the crime, which addition he said could be inferred from the later acts of concealment (Grunewald Appendix, pp. 750-53).

As Judge Frank, in his dissent on the petition for rehearing, points out, this permitted an act of concealment after the conspiracy was accomplished to revise and extend the conspiracy and work an indefinite extension of the Statute of Limitations and was forbidden by the rulings in the *Krulewitch* and *Lutwak* cases. On the government's original theory and the theory on which the case went to the jury, an acquittal should have been ordered. (We asked this by motion—Grunewald Appendix, pp. 555-561, 725, denied, pp. 583, 725—and by requested instructions 23 to 27, pp. 793-4, which were denied, pp. 728-9.) To allow room for the theory advanced by Judge Medina in the majority opinion, at least a new trial was necessary. Which is, as we understand it, the basis for Judge Frank's view that a new trial should be granted.

Finally, the conviction could not be sustained on the theory that there was a new conspiracy to conceal an old conspiracy. (a) That was not the basis for the affirmance. (b) There was no proof of such a later conspiracy. (c) Grunewald was acquitted of the charge of complicity in efforts to influence the testimony of witnesses. (d) To submit, as a single conspiracy, proof of two conspiracies,

one of which was barred by the statute of limitations, would be error and was particularly objected to at and before the trial and motions made to compel an election or to dismiss as to the barred conspiracy (Grunewald Appendix, pp. 561, 566-572).

Judge Frank recognized all this when he said, in his second dissenting opinion:

> "* * * It could serve, at most, to prove a new conspiracy to conceal an older conspiracy. In that event (although such a new conspiracy would be evidence of the older conspiracy) the defendants could not, on such evidence, be convicted of the older conspiracy which ended in 1949, since the statute of limitations would have run against the older three years after 1949. See *U. S.* v. *Siebricht*, 59 F. 2d 976, 978 (C. A. 2) to the effect that an old conspiracy 'could not be revived by the breath of a new and different conspiracy * * *'. The defendants were not indicted for such a new conspiracy, and the judge's charge precluded a conviction based thereon."

2. Cross examination as to claim of privilege against self-incrimination. A major constitutional question is presented by the cross examination of the defendant Halperin with respect to his previous claim of privilege before a grand jury (Grunewald Appendix, pp. 694-717). As Judge Frank said in his dissenting opinion below:

> "It is noteworthy that the Supreme Court has never applied the Raffel doctrine to a case where the previous exercise of the privilege occurred in a grand jury hearing.".

What happened here was that Halperin, who contradicted Davis and other government witnesses at every material point and established a clear issue of fact for himself, Grunewald and Bolich, was attacked on cross

examination because of his claim of privilege before the grand jury and made to admit that he said that the answers might incriminate him and that he was answering truthfully at the time. This was permitted as bearing upon his credibility (Grunewald Appendix, p. 768). Since the factual defense rested upon his credibility, the attack was, of course, destructive. Repeated objection was made.

In *Raffel* v. *United States,* 271 U. S. 494 (1926), this Court held it proper on a second trial to question a defendant on the stand concerning his failure to take the stand in the first trial. From this ruling the Court below has proceeded to hold proper the cross examination in the case at bar. The dissenting opinion below holds that the *Raffel* case has been implicitly overruled by *Johnson* v. *United States,* 381 U. S. 189. There this Court held it improper to comment upon a claim of privilege where a defendant took the stand and claimed his privilege as to some questions and was sustained in that claim by the Trial Court.

Moreover, our situation differs markedly from the *Raffel* case. In that case, the defendant's failure to take the stand in the first trial was something done in open court at a public trial where he was represented by counsel. The situation is far different when a prospective defendant is brought into the secrecy of the grand jury room prior to trial, where even a judge is not present, and is subjected to a one sided barrage of questions which may have no other purpose than to elicit a refusal based upon possible self-incrimination. The well known fact that most attorneys will not permit their clients to testify under such ex parte conditions should not be used against a defendant who thereafter takes the stand in his own defense.

It is no answer to say that, when he does take the stand, he waives his privilege. He does so, of course, and

then may be asked about any criminal or disgraceful conduct in his past. But this is not to say that his prior claim of privilege was disgraceful or criminal or an implied admission of guilt or perjury to any degree (See *Slochower* v. *Board of Higher Education*, decided by this Court April 9, 1956). Yet, cross examination as to a prior claim of privilege, on the theory that it affects credibility, is only sustainable upon the theory that the prior claim of privilege is inconsistent in some way with the subsequent claim of innocence. It is thus a serious infringement of the constitutional privilege. The rule established in many jurisdictions is that a suspect may not even be subpoenaed before the grand jury (*People* v. *De Feo*, 308 N. Y. 595).

To permit such a course is to allow a prosecutor to subpoena a prospective defendant and put him to the choice of the one-sided inquisition or the giving up of any hope that he can subsequently take the stand in his own defense. If this Court's repeated rulings, that the privilege may not be impaired and that its exercise imputes no taint of perjury or guilt, are to be effective, then the judgment below should not stand. It is impossible to expect a jury to make nice legal distinctions when a defendant can be compelled to say, "I refused to answer before the grand jury on the ground that my answer might incriminate me."

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3. Use of a prior hypothetical statement of an attorney as a prior consistent statement of a witness. A further serious question of evidence arises in the rulings below with respect to an alleged prior consistent statement of Davis, proven on his redirect examination (Grunewald Appendix, pp. 395-407). Davis was an admitted perjurer with no law, no code, no ethics (Grunewald Appendix, p. 374). The cross examination suggested that he was fabricating his story to put the $160,000.00 he had obtained from

his clients into someone else's hands so he would not be accountable for it. The government, over objection and exception, was permitted to prove that, in 1952, when Davis saw that his clients were about to testify fully, he sought to make a deal for himself and in that connection authorized his attorney to make a hypothetical statement to the government about the $100,000.00 and the $60,000.00. In all essential respects, the very purpose of Davis in authorizing such a statement was exactly the same as attributed to him at the trial, namely to buy himself a deal with the government.

We have found no case, nor has the Government so far cited one which would justify admission of a prior hypothetical statement of an attorney. However, passing the hypothetical part for a moment, it is clear that even a prior consistent statement by the witness himself is not admissible, unless made at a time when the motive to fabricate did not exist. (*Ellicott* v. *Pearl*, 35 U. S. 412, 439-40; *Conrad* v. *Griffey*, 52 U. S. 480, 491; *Di Carlo* v. *U. S.*, 6 F. 2d 364, 366; *Dowdy* v. *United States*, 46 F. (2d) 417.)

Thus, this Davis testimony was not admissible. And certainly the nature of it as a hypothetical statement through his attorney did not permit it to be regarded as any statement of fact at all.

The error was a serious one. The testimony had a tendency to bear out Davis. It was offered for that purpose; it must be assumed it had some effect to accomplish that purpose; and, with one who was of such unwholesome character, it may have been the deciding straw. This error would require a new trial.

Wherefore petitioner respectfully prays that a writ of certiorari be granted and that the judgments below be

reversed and petitioner be acquitted or be granted a new trial.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 183.

HENRY W. GRUNEWALD,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF THE PETITIONER.

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Opinions Below.

The opinions of the Court of Appeals (Appendix V, pages 288a, 316a, 381a) are reported in 233 F. 2d 556-598.

Jurisdiction.

The judgment of the Court of Appeals was entered April 10, 1956 (App. V, page 358a). Petitions for rehearing were denied June 1, 1956 (App. V, page 394a). Petitions for writs of certiorari were filed June 21, 1956 and granted October 15, 1956 (R. 984). Jurisdiction is invoked under 28 U. S. C. 1254 (1).

Questions Presented.

1. Whether conviction of a conspiracy to procure from the Fraud Bureau of the Internal Revenue Department a decision not to prosecute a tax fraud, where the object of the conspiracy had been accomplished by January, 1949, and prosecution was barred under the statute of limitations by January, 1952, may be sustained, on the theory that the conspiracy must have included a continuing agreement to conceal—the indictment having been found October 25, 1954, and the proof being that one or more of the conspirators in March, 1952, attempted to cover their tracks from investigators.

2. Whether independent acts of alleged conspirators, after the accomplishment of the object of the conspiracy and done without the knowledge or the participation of the petitioner Grunewald, may suffice to support a charge against him that the original conspiracy included a continuing purpose to conceal so that the conspiracy might be deemed to extend down to the last act of concealment.

3. Whether an alleged continuing conspiracy to conceal could be found as to the petitioner Grunewald, when he was concerned only with the original object of the conspiracy and was acquitted by the Trial Court on three counts of attempting to influence witnesses, which the Court charged the jury could be acts of continuing concealment.

4. Whether a purpose to continue to conceal the accomplishment of the primary conspiracy may be inferred from the fact that the conspirators would be presumed to know that their activities would always be open to investigation —whether a subordinate conspiracy to conceal may be implied from the original crime.

5. Whether the Trial Court committed error in permitting the jury to find a continuing conspiracy to conceal from the fact that, more than three years after the object of the conspiracy had been accomplished, the petitioner Grunewald, when his secretary was subpoenaed before a grand jury, told her she need not answer various questions and could say she forgot.

6. Whether the Trial Court committed error in permitting the defendant Halperin, the only witness for the defense, to be cross-examined, for the purpose of impeaching his credibility, on the fact that he had been, prior to the trial, subpoenaed before a grand jury and had there claimed his constitutional privilege against self-incrimination on a long line of questions.

Constitutional Provisions and Statutes Involved

Fifth Amendment

"* * * nor shall be compelled in any criminal case to be a witness against himself * * *."

Section 371, Title 18 U. S. C. A.

"371. Conspiracy to commit offense or to defraud United States:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Section 3282 Title 18 U. S. C. A.

(As applicable to offenses prior to 1954 amendment.)

"3282. Offenses not capital.

Except as otherwise expressly provided by law, no person shall be prosecuted, tried or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed. June 25, 1948, c. 645, 62 Stat. 828."

Statement of Case.

In the Southern District of New York, the petitioner Grunewald (No. 183) and the petitioners Max Halperin and Daniel Bolich (Nos. 184, 186) were convicted on the first count of a seven count indictment filed October 25, 1954 (R. 2-4, 782). Grunewald was not a defendant on the second count and was acquitted by the Court on the remaining counts (R. 569). The other petitioners were convicted on additional counts (R. 3, 782). The conspiracy charge in count 1 was laid under 18 U. S. C. 371 and charged a conspiracy to defraud the United States in the administration of the revenue laws and to commit the offense of corruptly influencing witnesses before a Congressional Committee and Grand Jury for the purpose of concealing the crime (R. 4-7). Each of the petitioners was sentenced to five years imprisonment and fined on that count (R. 2, 3, 783).

The Court below affirmed, with Judge Frank at first concurring as to petitioners Grunewald and Bolich, but dissenting as to Halperin (App. V, 288a, 316a) and then, on petition for rehearing, dissenting as to all (App. V, page 381a). Judge Frank's original dissent as to Halperin was upon the ground that Halperin's rights had been violated by permitting his impeachment by cross-examination showing that he had claimed his privilege on these issues when called as a witness before a grand jury.

The second dissent was upon the ground that the statute of limitations would have barred conviction upon the theory on which the case was submitted to the jury and that at least a new trial would be necessary if the theory advanced in the majority opinion were sound.

In 1948, two firms, Gotham Beef Company and Pattullo Modes, Inc., there being no connection between the two, were separately being investigated by the Fraud Bureau of the Internal Revenue Department for income tax frauds (R. 285-6, 419). Both firms retained a New York law firm named Schopick & Davis (R. 300-301, 314-15). Sharing the office with the Davis firm, on a tenancy basis, was the petitioner, Halperin (R. 300).

Most of the elements of the government's case are shown in the testimony of Davis. He said that he asked Halperin for help in each case (R. 309, 313); that Halperin said he knew Grunewald, who was extremely influential (R. 309); that Halperin subsequently reported that Grunewald was willing to help (R. 313) and had agreed to help in the *Gotham Beef* case for $60,000 (R. 321). All this occurred in the period July-August, 1948 (R. 317-21).

Davis further testified that he asked Halperin to see if Grunewald could handle the *Pattullo Modes* case (R. 318); and that subsequently, in October, 1948, Halperin took Davis to Washington, introduced him to Grunewald and said, in Grunewald's presence, that the latter had agreed to accept $100,000 in the *Pattullo* matter, whereupon Davis thanked Grunewald, who said, "O. K." (R. 327-8).

At this time the administrative practice in the Fraud Bureau and the Internal Revenue Department was that the Special Agent would make an investigation and a report with his recommendation, which recommendation would then be reviewed by an immediate superior, then again reviewed by the technical adviser to the agent in charge of

the office (R. 294); then the matter went to the Penal Division of the Fraud Bureau and from there to the Washington office and then to the Attorney General's office (R. 295). In all of these steps, the only cases which went forward were those where there had been a recommendation for prosecution, confirmed by the person reviewing at the next higher level. If there were a determination of no prosecution anywhere along the line, the case ended at that point (R. 295-6).

The whole object of the conspiracy, therefore, was to obtain a no prosecution ruling, the theory being that Grunewald was a close personal friend of Bolich (R. 309) who, until September 1, 1948, was agent in charge of the New York office of the Fraud Bureau (R. 464) and thereafter was assistant commissioner of Internal Revenue (R. 465). This object of the conspiracy was expressed by Davis' clients as follows:

Mr. Marks (Pattullo Modes) (R. 31):

"Q. Was anything said about criminal prosecution? A. Well, when I say was satisfactory to us, that is the ends we were seeking at that time, to settle this matter in a civil way without criminal prosecution, and Mr. Halperin went to Washington to see his friend to attain that result for us.

The Court: By civil do you mean paying any taxes but avoiding a criminal prosecution? Is that what you mean?

The Witness: That is right, your Honor." and again (R. 32):

"Q. Did you have any discussion with Davis about how you would learn when you got this result? A. Mr. Davis told us that we would never get anything written from the Government that our case was going to be settled in a civil manner. He says all he could promise us that there would be a mem-

orandum put into our file that the case was to be settled on a civil basis."

Mr. Tobias (Gotham Beef Company) testified (R. 165-6):

"Now, the exact terms of the escrow • • • was • • • that until I were to have heard with my own ears from the special agent's office from a responsible official there that was to be no criminal prosecution in the Gotham matter • • • the money was not to be released."

To the same effect is testimony of Mr. Berman, one of the owners of Gotham Beef Company (R. 154-5).

In the *Gotham Beef* case, the object was accomplished and the ruling announced in October, 1948 and Davis testified that the money was paid (R. 325-6). In the *Pattullo Modes* case, the ruling was announced on January 10, 1949 and Davis, likewise, testified that the money was turned over on the 12th or 13th of January (R. 331-3).

There was further evidence that in June of 1950 Davis talked with a prospective client named Glover about handling a tax fraud case for Glover (R. 341), but after some discussions a fee could not be agreed upon and the Davis firm withdrew (R. 346-7).

In July and August, 1951, a Congressional Committee began an inquiry into tax cases and made some inquiries at Pattullo Modes (R. 38-9). Davis said to refer inquiries to him (R. 39). Davis then decided the Pattullo Modes people should have their own counsel and ultimately brought them to Mr. Boris Kostelanetz (R. 356). The latter advised that when they were subpoenaed before the Committee, they should claim their privilege, which they did (R. 41-3). Some months later, around January or February, 1952, the Pattullo people were subpoenaed to go before a Brooklyn Grand Jury and Mr. Kostelanetz arranged

immunity for them in return for their testimony (R. 44-5, 20-21). Davis suspected such an arrangement had been made and suggested that the Pattullo people consult another lawyer to see whether such a course was in their own best interests (R. 362).

In early 1952, and particularly in March, 1952, Davis or Halperin, or both, saw the Gotham Beef people, Mr. Berman and Mr. Tobias and suggested that they should not talk, but to stand on their constitutional rights (R. 149-50, 170-172). There was also talk about the publicity that the *Pattullo* case had received in the newspapers (R. 170).

In the same period, in the Spring of 1952, the petitioner Halperin was subpoenaed before the Brooklyn Grand Jury, but claimed his privilege on all matters in issue here. The court allowed such facts to be shown for the purpose of impeaching his credibility and adhered to the ruling over the strenuous objection of all counsel (R. 684-703).

In May, 1952, Mrs. Nancy Hain was subpoenaed before the Brooklyn Grand Jury (R. 531). She had been a secretary for Grunewald from June, 1949 to January, 1950 and again from June, 1950 to February, 1951 (R. 526). She knew generally that he was friendly with Bolich and Halperin (R. 527-9); paid his bills by cash (R. 527); and had said when people had tax problems, they brought them to him and he would get them fixed or fixed up (R. 530, 541). In a telephone talk with Grunewald after she received her subpoena, he offered to send her expense money and said that, as his confidential secretary, she did not have to divulge his personal business and could say she didn't remember (R. 532-3). She consulted her current employer, an attorney, returned the expense money, went to New York and answered the questions of the government attorneys in a private talk, though there were some things she did not remember and this was not quite truthful (R. 533-4).

Summary of Argument.

1. Concededly, the statute of limitations applicable to the conspiracy charged in count 1 was three years. This conspiracy to obtain the no prosecution decisions in the *Pattullo Modes* case and the *Gotham Beef* case was accomplished in January, 1949, when the desired rulings were made. The only other case considered, the *Glover* case, was abandoned in June or July, 1950, before any agreement was made, but is still beyond the limitation period. The indictment was not found till October 25, 1954. It was conceded that no act took place within the three years preceding the indictment except a possible act of concealment. Except for the concealment feature, therefore, prosecution would have been barred under the three year limitation. Motions for judgment of acquittal on the ground that the acts of concealment did not toll the statute were denied and the case submitted to the jury with instructions to acquit unless the original conspiracy included an agreement to conceal and an overt act occurred within three years.

The concealments relied upon were occurrences between three and three and one-half years after the no prosecution decisions were obtained. These concealments were essentially four items. The first three consisted of approaches by Davis or Davis and Halperin to witnesses from the Pattullo Modes and Gotham Beef companies, with the suggestion that they should stand silent and rely on their constitutional rights. These suggestions were made when Davis learned or suspected that the witnesses were about to testify. These approaches were charged as substantive offenses in counts 5, 6 and 7 of which Grunewald was acquitted by the Trial Court. In any case, they were, at most, attempts to avoid detection and punishment. The fourth

item was the remark of Grunewald to his secretary in May, 1952, that she did not have to divulge his personal affairs.

Attempts to avoid detection after a conspiracy has been accomplished cannot be overt acts done to effect the object of the conspiracy.

There was no proof that these acts had been contemplated at any time before the main conspiracy was accomplished. The principles stated in *Krulewitch* v. *United States,* 336 U. S. 440 and *Lutwak* v. *United States,* 344 U. S. 604, preclude implying an extension of the conspiracy from later acts of concealment, since these are in the nature of afterthoughts and a contrary rule would wipe out the statute of limitations altogether.

Moreover, the life of a conspiracy cannot be extended by a mere concealment. If it takes place before the main object is accomplished, it may have the dual purpose of accomplishing the main object and of avoiding detection. After the main object has been accomplished, the concealment is merely an effort to avoid detection. If innocent, it amounts to nothing. No man is required to confess a crime. If guilty means are used, it is a new and different conspiracy.

One may not be convicted of a single over-all conspiracy where there are two conspiracies and the first is barred by the statute of limitations, nor may anyone be convicted of a single conspiracy on the theory that a concealment after the main object has been accomplished is an overt act to accomplish that object sufficient to toll the statute of limitations.

The Trial Court instructed the jury that the indictment charged but one single conspiracy and that the statute of limitations would require the acquittal of the defendants unless it could be found that there was, within the life of the original conspiracy, an agreement to conceal it and that

an overt act occurred within the three year limitation. This permitted a conviction on the basis of an implied subordinate conspiracy to conceal, based on subsequent acts of avoidance. This was contrary to the ruling in the *Krulewitch* case and on such theory the defendants should have been acquitted. This acquittal was refused. Specific exception was taken in the instance where Grunewald was concerned in an act of possible concealment (R. 756-7) and motions to set aside the verdict were denied (R. 767). Exception was also taken to the failure to distinguish between different conspiracies (R. 752) and to the submission of the issue of concealment (R. 753, 757).

The majority opinion below first takes an erroneous view of the scope of the conspiracy and even then resorts to implications that the defendants must have known they would be investigated to justify an implication that the later acts of concealment were part of the original conspiracy. This still violates the principles stated in the *Krulewitch* and *Lutwak* cases. A single conspiracy charged and submitted to the jury was barred by the statute and the defendants should have been acquitted.

2. The principal argument and summary on the question of allowing cross-examination of the defendant Halperin on his claim of privilege is presented in Halperin's brief and we rely upon that brief. The error seriously affects this petitioner because the defendant Halperin was the witness for the defense who created a clear issue of fact by disputing every point of the government's contention that he had arranged and procured, through Grunewald, the no prosecution decisions. His credibility was a critical issue. The Trial Judge permitted him to be cross-examined for the purpose of impeaching his credibility by a showing that he had claimed his privilege when subpoenaed before the grand jury.

This was done on the theory that the prior claim of privilege creates inconsistency with the subsequent claim of innocence and may be considered by a jury as impeaching evidence. The ruling depends upon *Raffel* v. *United States*, 271 U. S. 494 (1926), which allowed a defendant, testifying on a second trial, to be impeached for failure to take the stand on his first trial. The *Raffel* case is believed not to be controlling and in any event to have been implicitly overruled by the decisions in *Johnson* v. *United States*, 381 U. S. 189, and *Slochower* v. *Board of Higher Education*, 350 U. S. 551. A distinction is also inherent in the difference between appearance on a trial in open court and appearance before the secret grand jury. A rule imposing a penalty for exercise of the constitutional privilege is wrong. It would also lead to permitting general secret examinations of prospective defendants or an alternative of destroying effective use of the right to testify at the trial.

ARGUMENT.

I.

Conviction of petitioner under the first count for conspiracy to corrupt the Revenue Bureau was barred by the statute of limitations. The proof did not justify a finding that the life of the original conspiracy was extended by an agreement to conceal to be implied from a later act of concealment. Mere concealment cannot extend the life of the conspiracy for the purpose of tolling the statute of limitations.

The charge of conspiracy in Count 1 is laid under Section 371, Title 18 U. S. Code. There is no dispute that the period of limitations applicable to this charge is three years (Section 3282, Title 18 U. S. Code; *U. S.* v. *McElvain*, 272 U. S. 633; *U. S.* v. *Witt*, 215 F. (2) 580 (C. A. 2)). The 1954

amendment changing the period to five years did not affect cases already barred (68 Stat. 1145, Chap. 1214, Section 10 (b)).

Section 371 makes it a crime to conspire to defraud the United States or to commit an offense against the United States. The indictment herein charged both objects to wit—to defraud the United States in the exercise of its governmental functions of administering the Internal Revenue laws and of detecting and prosecuting violations (R. 4)—and—to commit certain offenses against the United States, to wit: corruptly to influence and impede witnesses before a grand jury in the Eastern District of New York and witnesses before a Congressional Committee (R. 5).

Paragraph "7" of Count 1 charges it was a part of the conspiracy that the co-conspirators would make continuing efforts to avoid detection and prosecution through any means whatsoever, including bribery, improper influence of government employees, giving false testimony, influencing and impeding witnesses, obstruction of justice and presentation of false statements and documents to the Bureau of the Internal Revenue (R. 6).

Paragraphs 13 and 14 of Count 1 charge it was a part of the conspiracy that the conspirators would conceal the acts done by any means, including influencing witnesses before any governmental body, legislative, executive or judicial (R. 7).

This indictment, then, charges one continuous conspiracy, first, to corrupt the revenue, and second, to conceal the crime by influencing witnesses before a grand jury and a Congressional Committee. The Trial Court so ruled, saying (R. 727):

> "With respect to Count One of the indictment, I charge you that but a single conspiracy is alleged • • • ."

What the proof actually showed was that the alleged payments in the *Pattullo Modes* and *Gotham Beef* cases were to procure decisions within the Fraud Bureau of the Internal Revenue, not to prosecute. The object to be accomplished in each case was expressly stated. Mr. Marks (*Pattullo* case) testified (R. 32):

> "He says all he could promise us that there would be a memorandum put into our file that the case was to be settled on a civil basis."

Mr. Tobias (*Gotham Beef* case) testified (R. 165-6):

> "Now, the exact terms of the escrow * * * was * * * that until I were to have heard with my own ears from the special agent's office from a responsible official there that was to be no criminal prosecution in the Gotham matter * * * the money was not to be released."

See also Berman's testimony (R. 144, 153-4).

The decision not to prosecute in the *Gotham Beef* case was announced in October, 1948 (R. 167) and the money released (R. 167, 169). The decision in the *Pattullo* case was announced January 10, 1949 (R. 37) and the money released a day or two later (R. 330-333).

Thereafter, nothing of significance occurred till the Congressional Committee began its inquiries in the summer of 1951 (R. 149, 170, 354-5). In June, 1950, Davis did enter into negotiations with one Glover about a pending tax case, but, on failure to agree on a price, the matter was dropped (R. 340-347).

In all of the evidence to this point there is just one item of direct evidence, as distinguished from hearsay, which tends to connect Grunewald with a particular deal. Davis says that, in October, 1948, he went with Halperin to an

office in Washington; that Halperin went to an inner room and later returned with Grunewald; that Halperin then introduced him and said (R. 327): "Irving, in the *Pattullo* case Mr. Grunewald has agreed to accept $100,000." Davis thanked him and Grunewald said, "O. K., O. K." (R. 328).

Assuming that this conversation suffices to connect Grunewald with a plan to obtain a corrupt decision not to prosecute in the *Pattullo* case, or even that it showed a willingness to do the same thing in other cases, there is still an enormous gap in the proof. There is no proof whatever in this of any plan to influence witnesses before a Congressional Committee or grand jury three to four years later. However reprehensible, the most that can be said is that a crime was planned and completed, in one case by October, 1948; in the second case by January, 1949; and even if we include the abortive Glover discussion, that was dropped in June, 1950.

So far as concerns a conspiracy to obtain corrupt revenue decisions, then, the last effort even to make a deal occurred in June, 1950.

Since the indictment was found October 25, 1954 (R. 1), prosecution was barred for any of these acts.

This was all perfectly plain to the Government before it drew the indictment. It was even clearer at the trial on the proof, for the Government there conceded that the only overt acts relied upon to avoid the statute were acts of concealment, viz. (R. 565):

> "The Court: Let me ask you on that, because this is an important part; What overt act occurred within three years prior to the indictment other than overt acts in connection with, let us say, concealment? Anything?
>
> Mr. Heffron: None, your Honor, but none are required."

How could they avoid the bar? The device chosen was the "continuing conspiracy to conceal" inserted as part of the original conspiracy. This device demands careful analysis, upon which it will be found clearly defective.

It is wrong in principle, as was demonstrated by the reasoning of this Court in *Krulewitch v. U. S.*, 336 U. S. 440 and *Lutwak* v. *U. S.*, 344 U. S. 604.

In the *Krulewitch* case, the defendant was charged with conspiring with a woman defendant to cause another woman to be transported from New York to Florida for purposes of prostitution. After the trip had been accomplished and the woman had returned to New York, all three were arrested. While in custody, one of the women supposedly said to the other, in effect, "Don't talk. It is better for us to take the blame than Krulewitch." Evidence of this conversation was admitted on the trial, which resulted in a conviction. On appeal the Government contended that the main conspiracy necessarily implied a subordinate conspiracy to conceal the principal crime and that the conversation was admissible against defendant, though after the event and not in his presence, as a declaration in furtherance of the subordinate conspiracy to conceal. This theory was sustained by the Second Circuit Court of Appeals. It was rejected by the Supreme Court which said, at page 443:

> "We cannot accept the Government's contention."

Again, at page 444:

> "We are not persuaded to adopt the Government's implicit conspiracy theory which in all criminal conspiracy cases would create automatically a further breach of the general rule against the admission of hearsay evidence."

Further dangers in the theory were pointed out in a concurring opinion of Mr. Justice Jackson, who said (p. 456):

> "It is difficult to see any logical limit to the 'implied conspiracy', either as to duration or means, nor does it appear that one could overcome the implication by express and credible evidence that no such understanding existed, nor any way in which an accused against whom the presumption is once raised can terminate the imputed agency of his associates to incriminate him. Conspirators, long after the contemplated offense is complete, after perhaps they have fallen out and become enemies, may still incriminate each other by deliberately harmful, but unsworn declarations, or unintentionally by casual conversations out of court. On the theory that the law will impute to the confederates a continuing conspiracy to defeat justice, one conceivably could be bound by another's unauthorized and unknown commission of perjury, bribery of a juror or witness, or even putting an incorrigible witness with damaging information out of the way.
>
> Moreover, the assumption of an indefinitely continuing offense would result in an indeterminate extension of the statute of limitation. If the law implies an agreement to cooperate in defeating prosecution, it must imply that it continues as long as prosecution is a possibility, and prosecution is a possibility as long as the conspiracy to defeat it is implied to continue.
>
> I do not see the slightest warrant for judicially introducing a doctrine of implied crimes or constructive conspiracies. * * *"

In *Lutwak* v. *United States*, 344 U. S. 604, several defendants were charged with conspiring to circumvent the United States Immigration laws by contracting spurious marriages in Europe with war veterans for the purpose

merely of gaining entry to the United States as veterans' spouses. The object of the conspiracy was accomplished by admission of the last of the defendants to the United States on December 5, 1947. No question of the statute of limitations was involved, but the point was whether certain acts of some of the parties after the last entry were admissible in evidence. The Government claimed the evidence was admissible upon the theory of a continuing agreement to conceal, alleging such agreement as part of the conspiracy. However, the Supreme Court held that there was no evidence of such an agreement to conceal and that termination of the conspiracy by accomplishment of its object on December 5, 1947, would have to be assumed. For other reasons it held that testimony concerning certain acts of one of the parties after the conspiracy was relevant to show the nature of the marriage.

In this case we are not concerned with such a question. We are concerned with the Supreme Court's repeated refusal to validate the idea of extending the conspiracy period by a subordinate conspiracy to conceal. In the *Krulewitch* case the Government tried to imply the agreement, but did not even allege it in the indictment. In the *Lutwak* case the Government alleged it in the indictment, but then tried to imply it evidentially from the fact that the parties were naturally concealing the true facts from the Immigration authorities. Such an implication likewise, the Court refused to sanction.

Illustrating this is the Court's comment upon the claim in the *Lutwak* case that evidence of attempts to conceal after the object of the original conspiracy had been accomplished warranted the inference that the original conspiracy included the agreement to conceal. The Court said (344 U. S. at page 616):

> "There was a statement of Munio Knoll in the record to one witness Haberman that indicated

> Munio's purpose to cover up and conceal the conspiracy. This is not evidence that the conspiracy included the further agreement to conceal. It is in the nature of an afterthought by the conspirator for the purpose of covering up. * * * "

The clear danger of destroying the statute of limitations by inferring an original agreement to conceal from efforts by one or more of the conspirators after the event to escape the clutches of the law was again referred to in the dissenting opinion in the *Lutwak* case, wherein three of the Justices of this Court said (344 U. S., at page 622):

> "We agree with the Court that the crime, if any, was complete when the alien parties obtained entry into the United States on December 5. We think this was the necessary result of the holding in *Krulewitch* v. *United States*, 336 U. S. 440, 93 L. ed. 790, 69 S. Ct. 716. This requires rejection of the Government's contention that every conspiracy includes an implied secondary conspiracy to conceal the facts. This revival of the long-discredited doctrine of constructive conspiracy would postpone operation of the statute of limitations indefinitely and make all manner of subsequent acts and statements by each conspirator admissible in evidence against all. But, while the Court accepts the view of Krulewitch, we think its ruling on subsequent acts and declarations largely nullifies the effect of that decision and exemplifies the dangers pointed out therein."

In the instant case there was no evidence of an agreement in 1947 and 1948 of a conspiracy to conceal the facts from future investigating bodies. There was evidence that, three to three and one-half years later, when congressional and grand jury investigations were under way, a series of covering up acts occurred.

The pertinent testimony is that the parties were at ease for several years at the end of 1948 and the beginning of

1949. Then, in the summer of 1951, Davis called Marks and said a Congressional Committee was investigating tax settlements and any investigators should be referred to Davis (R. 38). Shortly thereafter Mrs. Segel, a stockholder in Pattullo Modes, did make a statement to an investigator, which Davis recognized as dangerous to the company's accountant, Smith (R. 111-12 355-6). He again told her and Marks to refer future investigators to him (R. 356).

Davis then withdrew as the Pattullo Modes attorney and turned the client over to Mr. Boris Kostelanetz (R. 356-7). On the advice of Mr. Kostelanetz, they claimed their privilege when subpoenaed before the Committee (R. 41-3). From this point on, the Pattullo Modes group followed the advice of Mr. Kostelanetz and ultimately arranged a deal for immunity (R. 20-21, 41-5). Davis says that he asked them to check that advice with another lawyer before opening up the story, but that they never did (R. 362, 45). These facts were the basis of the substantive charge contained in the fifth count. Grunewald was acquitted by the Court of any implication therein (R. 569).

As to the Gotham Beef people, there were requests in late 1951 and early 1952 that Mr. Berman and Mr. Tobias stand silent (R. 149-50; 170-72). Whether this was merely a suggestion that they rely on their constitutional privilege or an attempt to influence them corruptly, as charged in the sixth and seventh counts of the indictment, it was certainly no more than an attempt at self preservation. Again, Grunewald was acquitted of any connection with those events, charged as substantive crimes in the sixth and seventh counts.

Even if we concede that these talks with the Gotham Beef people and the Pattullo Modes people, in late 1951 and early 1952, were sufficient to establish an attempt to influence witnesses, subpoenaed or to be subpoenaed before

the Brooklyn Grand Jury, the fact is still clear that those acts were not and could not have been in contemplation of the alleged conspirators back in 1948. Nor is there a particle of evidence that Grunewald ever knew, heard of or had anything to do with these events. The Trial Judge directed his acquittal on the substantive charges (counts 5, 6 and 7) based on these attempts (R. 569).

In connection with these events, there is a statement in the record which the Government has consistently misconstrued to attempt to involve Grunewald therein. They usually say that he knew about it and was helping in it. The Davis testimony was that, not during the grand jury period, but during the Congressional Committee period in the summer of 1951, the following occurred (R. 363):

> "Q. Going back to the original Congressional investigation, did you have any talks at or about that time concerning Mr. Grunewald?
>
> Mr. Aranow: With whom and where?
>
> Mr. MacMahon: Anywhere.
>
> A. We did. We asked Mr. Halperin wasn't there anything that Mr. Grunewald could help in and why doesn't he go to see him. He said he would not go to see him, that he was sure that Mr. Grunewald knows about it, and that if he was in a position to help that he would."

Thus the fact is that, far from Grunewald being involved, there was an express refusal even to talk to him about it.

The only item of importance particularly affecting Grunewald in respect of concealment or influencing witnesses to conceal is found in the testimony of Mrs. Hain. She testified she was employed by Grunewald as a part time secretary from June, 1949 to January, 1950 and from June, 1950 to February, 1951 (R. 526). On May 13,

1952, she received a subpoena to appear before the Grand Jury of the Eastern District of New York; immediately thereafter she had a conversation with Grunewald, who sent her expense money for the trip and told her she did not have to discuss his personal business and could just say she did not remember (R. 531-3). She did not purport to know anything about any of the cases under discussion. There is not the slightest suggestion in the evidence that anyone but Grunewald knew of the subpoena or that he discussed it with anyone else. It is perfectly plain that, whatever might be his personal responsibility for this incident, it was his individual act and, in substance, amounted to nothing more than a grumbling protest about snooping into his personal business by calling a lady who had been a part time secretary. It had no probative force whatever to establish an agreement during the life of the original conspiracy in 1948 to conceal those 1948 activities from all investigating bodies in the future.

What we are concerned with at the moment is to show that none of the testimony in any wise supported the charge in the indictment of an original agreement to conceal the fact from investigating bodies in the future. The evidence demonstrated only nervousness on the part of people who were being investigated and who did the most natural thing in the world, namely, tried to cover up. The very argument said to have been presented to the Pattullo people or the Gotham people, that they ought to remember that a good turn was done for them and should stand silent, demonstrates that there was no original agreement to obstruct justice for all the future.

There was, accordingly, a clear failure to prove the charge in the indictment that the original conspiracy included a conspiracy to influence witnesses before the Congressional Committee and grand jury and an overt act

in furtherance thereof within three years prior to the date of the indictment. The defendants were entitled to an acquittal on the first count.

The Trial Court's view was that, to convict, since there was only one conspiracy alleged, it must be established beyond a reasonable doubt that the conspiracy included an agreement to conceal and that an overt act must have taken place within the three years prior to October 25, 1954. Where he differed with us was in permitting the jury to infer, from acts of concealment occurring three and one-half years after the main conspiracy ended, that the main conspiracy had included a subordinate conspiracy to conceal, which would extend the life of the conspiracy. He charged (R. 732):

> "You will recall that the indictment states, among other things, that it was part of the conspiracy that the defendants and co-conspirators would make 'continuing efforts to avoid detection and prosecution by any governmental body, executive, legislative, and judicial of tax frauds perpetrated by the defendants and co-conspirators though the use of any means whatsoever, including but not limited to . . . the influencing, intimidating, and impeding of prospective witnesses to refrain from disclosing the true facts.' (fol. 750). In other words, the indictment alleges that the conspiracy comprehended within it a conspiracy to conceal the true facts from investigation, should investigation thereafter eventuate. This is an important element of the first count of the indictment which you must take into consideration, inasmuch as the Statute of Limitations on the charge of criminal conspiracy is three years and unless the conspiracy was continuing to a period within three years prior to the date of the indictment, October 25, 1954; and some overt act was performed within that three-year period,

> the crime, if any, alleged in the first count of the indictment would be outlawed. It is the contention of the government that the conspiracy did not end when the taxpayers were advised that there would be no criminal prosecution recommended by the Special Agent's office, but that an integral part of the entire conspiracy was an agreement to conceal the acts of the conspirators and that when thereafter an investigation was started by Congress and by the Grand Jury in the Eastern District of New York, the conspirators performed overt acts in pursuance of the original conspiracy designed to conceal the true facts; and that these acts occurred within three years prior to the date of the indictment. On this issue, it will be necessary for you to determine whether, beyond a reasonable doubt, you can conclude that the conspiracy was of the nature described in the first count of the indictment and comprehended an agreement to conceal and whether some overt act took place in the period of three years prior to October 25, 1954 to carry out such purpose of the conspiracy."

and continued (R. 733-4):

> "To determine whether certain of the alleged overt acts were in furtherance of the object of the conspiracy, you have to determine the duration of the conspiracy. Did it end when the Pattullo Modes people and the Gotham Beef people received an assurance of no prosecution from the Bureau of Internal Revenue, or was a part of the conspiracy a continuing agreement to conceal the acts done (fol. 752) pursuant thereto? In determining whether a part of the conspiracy was an agreement to continue to conceal the illegal acts after their consummation, you may not imply that such an agreement was part of the conspiracy. You would have to find from the evidence of the acts and declarations of the co-

conspirators that there was an understanding or agreement to conceal the conspiracy. If you find that such an agreement or understanding to conceal the conspiracy was not a part of the conspiracy to defraud the government, but no more than an afterthought brought to the surface when the co-conspirators were confronted with the Grand Jury and King Committee investigations, then you must find, as a matter of law, that the defendants are not guilty of the crime charged in the first count of the indictment. If you find that the evidence shows, beyond a reasonable doubt, that as a part of a conspiracy to defraud the government, there was an agreement or understanding to conceal the illegal acts and that this too was an objective or part of the conspiracy, then you may find that such understanding was a part of the conspiracy. However, you must additionally determine whether this objective of the conspiracy was known to the defendants. If this objective was known originally by only part of the conspirators but thereafter during the existence of the conspiracy, the scope of the conspiracy was extended so as to include such an agreement to conceal, and if you find that some of the defendants did not know of the expansion to include the agreement to conceal, you may not impute to them the knowledge of their co-conspirators and they could not be found guilty of the crime charged in Count One."

In short, the Court's charge required that, before the conspiracy to defraud was accomplished, there must have been added to it a conspiracy to conceal or else the defendants must be acquitted under the first count by virtue of the three year limitation. This was the whole theory of the indictment, that there was but one conspiracy. In any event, however, his charge became the law of the case and conviction on no other basis could be allowed to stand.

(*Bollenbach* v. *United States*, 326 U. S. 607; *Kotteakos* v. *United States*, 328 U. S. 750).

This was acknowledged by all of the members of the Court below. The majority opinion, after quoting from the above portion of the charge, said (Appendix V, p. 301a):

> "Accordingly, if there was insufficient evidence to support the above quoted portion of the Judge's charge, we must reverse."

As we have shown, the proof did not permit an inference that there was such an agreement to conceal within the life of the main conspiracy. The petitioner, should, therefore, have been acquitted upon the first count. We requested such acquittal at the close of the government's case (R. 546-51); again at the close of the whole case (R. 710); and both such motions were denied (R. 569, 710); as also were motions to set aside the verdict (R. 766, 778-80). We also asked an instruction to the jury, number 23 (R. 771), which would have eliminated the question of concealment, but it was refused, with an exception (R. 713). The failure to grant the motion to acquit should be corrected here.

Reasoning of the Court below.

The answer of the majority opinion below was that it was possible to find that the conspiracy to escape punishment or conceal existed within the life of the original conspiracy to defraud, so that the Statute of Limitations was not a bar. This answer rests upon several errors.

(a) First, it is said (Appendix V, p. 302a), that what the conspirators had to sell was "freedom from criminal prosecution", which freedom was to run for the whole period of the Statute of Limitations against the tax payers Pattullo Modes and Gotham Beef. The Court treats the official announcement that there would be no criminal prosecution as merely the delivery of a substantial installment

of what appellants agreed to deliver for the huge sums paid. It says, "The six year Statute of Limitations (26 U. S. C. [1940 ed.] §3748) did not run in favor of the tax payers until sometime after the commission of the overt acts relied upon."

(b) Next, it is said that ordinary steps to avoid detection, while the main crime was in progress, showed a purpose to conceal (Appendix V, p. 303a).

(c) Finally, the Court says that the conspirators "must have known from the outset that the success of their enterprise was in real danger at all times" (Appendix V, p. 304a).

ERRORS IN THEORY OF COURT BELOW.

(a) The main premise, that the object of the conspiracy was that the tax payers were to be protected from criminal prosecution throughout the period of the Statute of Limitations applicable against them, was without basis in the evidence. No such testimony was given or suggested. The Pattullo Modes people were particularly told that all that could be done was to get a no prosecution ruling. Under normal administrative practice, any such ruling along the line terminated the matter (R. 294-296). When they obtained such a ruling, they paid. In the *Gotham Beef* case, the point was even more particularly stated, namely, that an official of the Bureau was to personally state within the hearing of the accountant for the Gotham Beef Company, that the decision was not to prosecute. Then the Gotham Beef money was paid. To say that this testimony permits an inference, that the object of the conspirators was to insure immunity for a period of years bounded by the Statute of Limitations, is to distort the matter beyond reasonable inference.

Furthermore, continuance of a conspiracy must be shown by evidence. No evidence appeared here of any act done

after January, 1949, to help these taxpayers avoid prosecution.

Moreover, no such theory was submitted to the jury.* As will be seen from the above quoted portion from the Judge's charge, the Trial Judge put the issue to the jury, as a determination whether the conspiracy to defraud ended in January, 1949 with the announcement of the no prosecution decision, or whether it included, in addition, a conspiracy to conceal, which would carry its life down to the period within three years prior to this indictment.

Judge Frank pointed this out in his dissenting opinion filed on the motion for a rehearing. He gave his notion of what the charge would have had to be in such a case (Appendix V, p. 384a) and then said (Appendix V, p. 385a):

> "Under the charge as given, however, it was not essential that an objective of the original conspiracy was to prevent prosecution of the taxpayers for tax

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* Nor was any separate conspiracy submitted to the jury. The harmful effect of submitting as one conspiracy, two conspiracies, the first of which was barred by limitations, and the lack of proof to support any other theory, was called to the Court's attention in support of motions for judgment and motions to strike and to sever (R. 549-50, 559) and exceptions were taken to the failure to distinguish between different conspiracies and to the submission to the jury of the issue of concealment (R. 752-753, 757). On the same subject, Judge Frank in his dissenting opinion (App. V, 389a) said:

> "It could serve, at most, to prove a new conspiracy to conceal an older conspiracy. In that event (although such a new conspiracy would be evidence of the older conspiracy) the defendants could not, on such evidence, be convicted of the older conspiracy which ended in 1949, since the statute of limitations would have run against the older three years after 1949. See *U. S.* v. *Siebricht*, 59 F. 2d 976, 978 (C. A. 2) to the effect that an old conspiracy "could not be revived by the breath of a new and different conspiracy * * *". The defendants were not indicted for such a new conspiracy, and the judge's charge precluded a conviction based thereon. See, e.g., *U. S.* v. *Siebricht, supra.*"

> evasion until the six year statute of limitations had run against such prosecution, but it sufficed under the charge if the jury found (1) that the conspiracy included an implied agreement or understanding to conceal the conspiracy for any purpose, plus (2) an overt act of concealment committed by any of the defendants at any time—even an overt attempt by one of the defendants to save himself from prosecution."

Again, it is evident from admissions of the government, that there was no proof of the continuance of the main conspiracy to defraud down to the period within three years prior to indictment. This appears from the discussion with the Court (R. 565) when the Court asked whether there was any proof of any overt act within three years prior to the indictment other than an overt act of concealment. The answer given was "none". It was crystal clear that the only thing that the government was relying upon, to extend the life of the original conspiracy, was a conspiracy to conceal as a part of the main conspiracy.

(b) As to the second reason advanced by the majority opinion, to wit: that ordinary acts to avoid detection are sufficient to justify the charge of a continuing conspiracy to conceal, the fallacy lies in two elements. We will assume that a man committing a crime walks softly, seeks a by-way, takes cash instead of checks, uses an alias and warns his confederates to "keep this under your hat". These normal incidents of escaping detection, of course, look both to the accomplishment of the crime and the avoidance of the penalty. It does not reasonably follow, however, that this connotes future confederation and mutual dependence and responsibility forever, after the immediate criminal object has been attained. Any other ruling would make

joint criminals conspirators for life, a bond which could not be broken, save by public confession.

In any event, an overt act sufficient to toll the statute of limitations must be, in the words of the statute, Section 371, an "act to effect the object of the conspiracy." With the accomplishment of this object, a simple act of concealment cannot be said to be an act to effect the object. It may be part of some new and different conspiracy, with other criminal objects. But, as to the attained object, it can no longer be effective. The overt act "cannot succeed the completion of the contemplated crime" (*Hall* v. *United States*, 109 F(2d) 976, C. A. 10). "There can be no furtherance of a conspiracy that has ended." (*Lutwak* v. *United States*, 344 U. S. 604, 617-18). Hence an act of concealment does not extend the statute on the completed conspiracy.

(c) Finally, the third point advanced below to the effect that the conspiracy to conceal existed as part of the main conspiracy because the appellants "must have known" that the success of their enterprise was always in danger and must have apprehended the possibility or likelihood of an investigation, was nothing more than the argument already rejected by this Court in *Krulewitch* v. *U. S.*, 336 U. S. 440, that every criminal conspiracy includes an implied subordinate conspiracy to do anything necessary to escape punishment. To say that the conspirators must have known of danger and must have inferred the possibility of investigation, simply presents the implied conspiracy theory in another guise.

Judge Frank, discussing these matters, said (Appendix V, p. 385a) "As I shall try to show below, overt acts of concealment, without more, cannot suffice to prove that an ordinary conspiracy included an agreement to conceal". He further said, upon the assumption that the conspiracy ended in 1949, (Appendix V, p. 385a):

> "* * * the record contains no evidence, other than overt acts of concealment, reasonably warranting an inference of an agreement to conceal as a part of the conspiracy. Therefore, any such agreement could only have been implied from the mere existence of the conspiracy itself; and any jury is very likely to conclude that when men enter into an illegal agreement, for which they can be prosecuted, they implicitly understand, as part of that agreement, that they will do those acts necessary to conceal their crime from the prosecuting authorities."

He went on to point out that such a finding runs afoul of the ruling in the *Krulewitch* case.

Judge Frank tried to find evidence of any acts which might have been done within the three years before the indictment, the object of which could have been to prevent prosecution of Pattullo Modes or Gotham Beef for their tax evasion. He lists a number of acts (Appendix V, footnote pp. 382a-383a) for consideration. His point is that, if there were such acts, then it might be possible to submit to a jury in the future the theory advanced by the majority opinion, that the conspiracy envisioned protecting Pattullo Modes and Gotham Beef throughout the entire period of the Statute of Limitations. Judge Frank lists in this footnote eight items, several of which he throws out summarily as clearly designed only to protect the conspirators. However, a review of all eight items shows that they all refer to individual acts occurring during the period of the Congressional Committee or Grand Jury investigations, and that none of them could reasonably be said to have been designed to avoid the prosecution of Pattullo Modes and Gotham Beef for tax evasion. And, as we have said, the government admitted that it had nothing within three years except an act of concealment.

It is submitted, therefore, that, neither under the theory of the indictment, as the case was submitted to the jury, nor on the theory contained in the majority opinion, which was not submitted to the jury, can this conviction be sustained. The proof was simply barren of evidence that during the life of the main conspiracy there was any conspiracy to conceal, which could toll the statute. On the law the defendants were entitled to an acquittal under the three year bar.

II.

It was error for the Trial Court to submit the incident between petitioner and his former secretary as a possible overt act in a continuing conspiracy to conceal.

We have already detailed what occurred between the petitioner and his former secretary when she received a subpoena for the Grand Jury in May, 1952. The Court charged that this could be an overt act in a continuing conspiracy to conceal sufficient to prevent the running of the statute of limitations (R. 733). The Court said:

> "You have heard testimony from the girl who had been the defendant Grunewald's secretary that when she was subpoenaed before the Brooklyn Grand Jury, Grunewald talked to her on the telephone and indicated that she need not answer certain questions, and that she should answer questions by saying that she forgot.
>
> "Were these overt acts in pursuance of the conspiracy? An overt act is defined, as a matter of law, as any act done to effect the object of the conspiracy. To be an overt act, it must be in furtherance of the object of the conspiracy, although standing by itself,

> it need not be a criminal act. The Statute of Limitations does not begin to run on a conspiracy indictment until after the last overt act done by a co-conspirator to carry out an objective of a continuing conspiracy."

Our exception (R. 757) was overruled (R. 762).

Since there was no proof of such an agreement to conceal, and since there was no connection between this incident and any other person in the case, it could not properly be regarded as an overt act in a conspiracy to conceal.

III.

It was error to permit impeachment of defendant Halperin for having claimed his constitutional privilege before the grand jury.

We rely upon the brief filed on behalf of petitioner Halperin (No. 184) on this subject.

The error, in permitting destruction of Halperin's credibility, likewise destroyed the major defense on the facts. Davis had implicated petitioner Grunewald by recounting an introduction by Halperin to Grunewald in October, 1948, —wherein Halperin is alleged to have said that Grunewald had agreed to accept $100,000 in the *Pattullo* case and Grunewald to have said "O.K." (R. 327-8). Without this evidence, there would have been no competent evidence sufficient to bring in Grunewald. Halperin denied this incident categorically (R. 631, 640). As Judge Frank pointed out, Halperin, if believed, could have been acquitted (App. V. 329a). Likewise this petitioner.

For the error as to Halperin's cross examination, fully objected to (R. 684-703), a new trial at least would be necessary.

Conclusion.

The judgment should be reversed and petitioner acquitted on the first count, or, in the alternative, a new trial should be awarded.

Respectfully submitted,

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF ON BEHALF OF PETITIONER GRUNEWALD.

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I.

The government's brief, in substance, concedes that the conviction on the conspiracy under Count 1 may be sustained only upon the theory that a subordinate conspiracy, within the original conspiracy, existed to conceal the original crime, so that any act of concealment thereafter, by any of the original conspirators, could be said to bring the original conspiracy down within the period of limitations.

They further concede that overt acts of concealment, after termination of the original conspiracy, would not

avoid the bar, for they say, in their summary of argument, that, in that situation, the *Krulewitch* case would be controlling.

Essentially, the government's claim is that:

1. The subordinate conspiracy to conceal from all future investigating agencies must be implied from the original crime, for they say:

> (a) "From the very nature of the conspiracy * * * there had to be * * * agreement to conceal * * *" (Government Brief, p. 51).
>
> (b) "Discovery of the fraud * * * would jeopardize the success of the entire conspiracy." (Government Brief, p. 51).
>
> (c) "Concealment of all phases of the operation was absolutely essential." (Government Brief, p. 52).

As to this argument, the necessity to imply a continuing agreement to conceal because open profession of the crime would lead to arrest and prevention, it has already been twice rejected by this Court in *Krulewitch* v. *United States,* 336 U. S. 440 and *Lutwak* v. *United States,* 344 U. S. 604.

2. The subordinate conspiracy to continue to conceal for all the future is established by ordinary furtive conduct in the course of commission of the crime, so that any act or crime of concealment thereafter revives the crime and is chargeable to all of the conspirators. In support of this, they cite three items.

> (a) They say "the conspirators, in all their contacts with their tax evading clients, * * * carefully withheld the identity of their contact man in the capital." (Government Brief, p. 52).

(b) They say an innocent attorney, Saver, was allowed to think that he had accomplished the result, though the contrary was the case. (Government Brief, p. 53).

(c) They say that the money was required to be paid in cash, so it could not be traced. (Government Brief, p. 53).

This is scarcely more than the implication of the conspiracy for all the future from the very commission of the crime, already discussed under item 1 above. However, it does not, in any event, suffice to establish any such future continuing conspiracy. Criminals do not come out in the public square to do their misdeeds. Of course, they try to cover the commission of the crime while it is in progress. The agreement to do so is merely the agreement to do the crime in secret. It is not an agreement to commit a host of crimes in the future. Such acts are done with the immediate end of the crime in view. If the conspirators subsequently agree upon a new crime, that subsequent conspiracy may be charged and proven, but it does not revive the old crime or defeat the bar of the statute upon the old crime. In short, when criminal A authorizes criminal B to accept payment of a bribe and insists that it be paid by cash, rather than by check, he does not authorize criminal B to murder a witness three years later. If criminal B, three years later, does murder the witness, it does not make criminal A liable for the murder or defeat a defense of the statute of limitations.

Every factor relied upon by the government in the instant case was present in the *Lutwak* case, 344 U. S. 604. There, as here, there were efforts at concealment during commission of the crime, such as spurious claims of marriage, false statements, etc. There, as here, there

were subsequent efforts, after the immediate object of entry into the United States had been obtained, to conceal by having a witness cover up the facts. Yet, the Court held that the conspiracy ended when the illegal entry was accomplished, despite the allegation that it was continued by an original agreement to continue to conceal. Nor did original surreptitious conduct, with subsequent efforts to conceal, suffice to extend the life of the conspiracy.

Even a general purpose to conceal is not a criminal conspiracy.

The whole idea that a general purpose to conceal binds conspirators together in a continuing criminal conspiracy is wrong. There can be no obligation on a criminal, in view of the Fifth Amendment, to reveal his crime. Undoubtedly, all criminals hope that the crime will lie concealed. Their joint hope will easily be construed to be a joint purpose. But a mere charge of agreement or purpose to conceal does not charge a criminal conspiracy. A criminal conspiracy must be one which either defrauds the United States or contemplates the commission of a crime. Until some such criminal purpose arises, concealment is merely a hope or a purpose or motive. It may be directed to perfectly legitimate means. For example, the most direct possible concealment, as when a criminal asserts the privilege under the Fifth Amendment, would not be criminal, nor would an agreement to do so be criminal. Similarly, a general desire to acquire money would not be criminal. It is only when there is an agreement upon an illegal method that the criminal conspiracy begins. So, if and when joint criminals agree upon doing some illegal act, they then enter a criminal conspiracy. Concealment here is only a motive. It is the agreement upon the new

criminal act which marks the new criminal conspiracy. The motive of concealment is not the crime.

Accordingly, it is urged that conviction of the conspiracy under Count 1 of the indictment was wrong in that conviction was barred by the statute of limitations.

II.

The government brief, in a footnote at page 84, suggests that, even if it were error to permit cross examination of defendant Halperin as to his grand jury testimony, this would be error only as to Halperin, because it was only Halperin's constitutional rights which were involved. This argument is far off the point as to the effect of the error upon the other defendants. As demonstrated in our main brief, page 33, Halperin was an essential witness for the defense and a particularly critical witness to the defendant Grunewald, for he directly contradicted not only the entire case for the government, but the prime piece of direct testimony relied upon to bring Grunewald into the conspiracy. The destruction of Halperin's credibility then necessarily destroyed Grunewald's defense. It is the improper impeachment of the important defense witness, entailing insuperable damage to the defense, which affects Grunewald's rights in the trial.

Witnesses may not be illegally destroyed on the theory that it is only the witness who is hurt. Such a principle would make travesty of a trial. In a far less obvious case, where evidence illegally seized from one defendant was used on trial against both, this Court has held that both were entitled to a new trial (*McDonald* v. *United States*, 335 U. S. 452).

For these reasons all defense counsel repeatedly objected to this cross examination (R. 685-703) and the petitioners are fully entitled to the benefit of their exceptions.

Respectfully Submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 183

HENRY W. GRUNEWALD, PETITIONER

v.

UNITED STATES OF AMERICA

No. 184

MAX HALPERIN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 186

DANIEL A. BOLICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITIOI

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (Vol. V App., pp. 288–357, 380–393) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 10, 1956 (Vol. V App., p. 358) and the petitions for rehearing were denied on June 1, 1956 (Vol. V App., p. 394). The petitions for writs of certiorari were filed on June 21, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

As to all three petitioners:

1. Whether the jury could properly find that a conspiracy to defraud the United States in the operation of the internal revenue laws was in existence during the applicable three-year statute of limitations under instructions authorizing them to convict only if they found that agreement to conceal the initial fraud was part of a continuing agreement to conceal the acts done, that such an agreement was known to each of the participants, and that it was established by evidence other than implication from the crime itself.

2. Whether the trial court committed error when it permitted the government to elicit from petitioner Halperin upon his cross examination that he had invoked the Fifth Amendment in refusing to answer the same questions while a witness before a grand jury.

3. Whether the trial court committed error in allowing the government to prove that its witness Davis had previously made a consistent statement to his attorney.

As to petitioner Halperin (No. 184):

4. Whether it constituted a denial of due process to petitioner Halperin to subpoena him to testify before a grand jury.

5. Whether the evidence supports his conviction for endeavoring to influence the testimony of witnesses.

As to petitioner Bolich:

6. Whether the evidence supports his conviction for conspiracy to defraud.

STATEMENT

After a trial in the United States District Court for the Southern District of New York, all three petitioners were convicted on count 1 of an indictment, returned October 25, 1954, charging a conspiracy among themselves and with others "to defraud the United States in the exercise of its governmental functions of administering the internal revenue laws and of detecting and prosecuting violations of the internal revenue laws free from bribery, unlawful impairment, obstruction, improper influence, dishonesty, fraud and corruption, and in its right and interest in the conscientious, honest and faithful services, judgments, determinations and actions of the defendants" who were employees of the Bureau of Internal Revenue, and to conceal the acts of the conspirators (R. 5–11). Each was sentenced to five years imprisonment and fined on that count (R. 2–4; B. 3–4).[1] Petitioner Halperin alone was convicted on counts 5, 6 and 7 which charged a corrupt endeavor to influence particular witnesses (Marx, Berman, and Tobias) before the Grand Jury in the Eastern District of New York

[1] "R." refers to the Appendix filed by Grunewald and Halperin in the Court of Appeals. "G." refers to the government's Appendix in that court and "B." to the Appendix filed below on behalf of Bolich. "Vol. V App." refers to the volume, filed here, containing the opinions and proceedings in the Court of Appeals.

to give false testimony and to withhold information concerning certain of the transactions involved in Count 1, in violation of 18 U. S. C. 1503 and 1505 (R. 16–19).[2] He was sentenced to two years imprisonment and $1,000 fine on each of these three counts, the sentences to run concurrently (R. 3–4). These judgment were affirmed on appeal (Vol. V App., p. 358), Judge Frank dissenting (Vol. V App. 288–357, 380–393).[3]

The evidence for the government may be summarized as follows:

In 1948, two firms, Pattullo Modes, Inc. a New York dress manufacturing concern, and the Gotham Beef Company, ship chandlers, were under investigation by the Bureau of Internal Revenue for income tax frauds (R. 83–84, 313–315, 588–590). From 1942 to 1946, Pattullo Modes had defrauded the government of corporate and individual income taxes by making off-the-record sales and "jacking up the travel and entertainment accounts" and putting the cash proceeds of over $300,000 in a safe deposit box (R. 20–23). The Gotham Beef Company failed to report income from sales of meat at above-ceiling prices during the war years on their partnership and individual income tax returns.

[2] These counts were dismissed as to other petitioners at the close of the government's case (R. 583).

[3] Petitioner Bolich was also convicted on count 2 which charged him, along with Steinberg and Scherm, as employees of the Bureau of Internal Revenue, with conspiracy in violation of 26 U. S. C. 4047 (e) (4) (R. 11–14). He was sentenced to three years imprisonment and a $5,000 fine on that count, the prison sentence to run concurrently with the five year sentence on count 1 (R. 3–4). The Court of Appeals, holding that both counts related to the same conspiracy, set aside the separate fine on count two (Vol. V App., p. 358).

Their claim was that this income was offset by unreported purchases at over-ceiling prices but the documentary proof of cash premium payments of over-ceiling prices amounted to only 10 and 20 per cent of the $100,000 off-the-record sales (R. 313–315). The Special Agent in the Fraud Division of the Bureau of Internal Revenue who was working on the case recommended it for criminal prosecution (R. 137, 288). Through intermediaries, both firms were referred to the law firm of Schopick and Davis (R. 211–212, 313–315).

In the Pattullo Modes case, Davis, who retained the law firm of Saver and Schwaeber to represent Pattullo Modes before the Bureau of Internal Revenue, conceived the idea of making a spurious voluntary disclosure to the Bureau through the unsuspecting Saver and Schwaeber (R. 308–310).[4] Smith, accountant for Pattullo Modes, agreed to swear to a false affidavit stating that he had made a voluntary disclosure to agent Scherm (R. 310). The claim was made to and rejected by the Chief of the Revenue Agents' Office (R. 310–311). Thereafter, the Pattullo Modes case went forward to the office of petitioner Bolich, then Special Agent in Charge of the Intelligence Unit of the Bureau of Internal Revenue, which office would have authority to recommend for or against criminal prosecution (R. 311). During March 1948, Saver presented the voluntary disclosure claim to Bolich who rejected it (R. 311).

[4] Under the then administrative policy, if a taxpayer voluntarily disclosed the facts of his fraud to the government before investigation turned up the information, criminal prosecution would not be pressed.

Davis told petitioner Halperin, an attorney who shared office space with the firm of Schopick and Davis, that there was no defense on the merits in the Pattullo Modes case and that they needed "real help" (R. 311). Halperin suggested contacting an old friend in Washington (petitioner Grunewald), who was a man of much influence and a close personal friend of Bolich (R. 312). When Davis told Halperin the facts in the Gotham case, Halperin went to Washington to re-establish his friendship with Grunewald (R. 220, 315–316).

During the early summer of 1948, Halperin, Hoffman (who solicited business for Schopick and Davis (R. 208)) and Davis went to Washington. Halperin went to Grunewald's suite in the Washington Hotel while the others waited in the lobby (R. 220). Halperin, on rejoining Hoffman and Davis, reported to them that he had discussed the Gotham Beef case with Grunewald who had received him well (R. 220–221). Grunewald, in Halperin's presence, had made a telephone call in which he identified himself as "Captain Henry" and instructed the other party to "put a red flag * * * on the Gotham Beef case" (R. 221). When Hoffman and Halperin were again in Washington in early July 1948, they went to Grunewald's suite to see if he would handle the Pattullo Modes case (R. 220). At that time, Hoffman was introduced to Grunewald who was neither an accountant nor a lawyer (R. 220, 540). Grunewald agreed to look into the Pattullo Modes case (R. 222).

Bolich's secretary in the New York Special Agents' Office of the Bureau of Internal Revenue testified that

Bolich had received telephone calls from a man who identified himself as "Captain Henry" (R. 508; G. 162–163). Grunewald's secretary during parts of 1949, 1950 and 1951 testified that she would telephone Bolich for Grunewald and, on the latter's instruction, would identify the caller as "Captain Henry" (R. 540). During the summer of 1948, Grunewald was sufficiently close to Bolich to give a party for him in the suite in the Washington Hotel to celebrate Bolich's anticipated appointment as Assistant Commissioner of Internal Revenue (R. 524).

Soon after Grunewald in Washington had agreed to look into the Pattullo Modes case, Bolich in New York requested the Special Agent assigned to the case to give him a status report (R. 433, 499). When Davis learned in July 1948 that the Special Agent on the case intended to circularize all Pattullo Mode customers and banks to learn whether all receipts had been reported, which would not only publicize Pattullo Modes' tax difficulties but would impair their bank credit and customer confidence, he spoke to Halperin (R. 318). Halperin promised to see Grunewald (R. 318). Shortly thereafter, Bolich issued an order that the field investigation in the Pattullo Modes matter be ended at once (R. 434, 498–499).

In the latter part of July 1948, when Davis, at Halperin's suggestion, tried to discuss the Gotham Beef case with Bolich by telephone, he was twice in one day put off by Bolich's secretary (R. 319). Upon learning this, Halperin called Grunewald and re-

ported back to Davis that Grunewald had said Bolich would talk to Davis. Davis again telephoned Bolich, was put through by the latter's secretary, and arranged a meeting for the following day (R. 319). At the meeting the next day in Bolich's office, Davis described the Gotham Beef case and was told by Bolich to submit to Kuehl, who was then reviewing the Special Agent's recommendation of criminal prosecution, the proof of off-setting overceiling cash purchases and net worth statements of the taxpayers (R. 319–320).

On the day of and following his meeting with Davis, Bolich called Kuehl, a subordinate with whom he had not communicated in three years, and informed him of Davis' visit and his contentions (R. 278–279). Kuehl pointed out to Bolich that the files showed that Ronayne, not Davis, was attorney of record for the Gotham Beef Company (R. 278). Bolich assured Kuehl that Davis would submit a power of attorney (R. 278). Davis filed one later (R. 280).

Halperin entered into elaborate negotiations with the taxpayers for the "fee" to be paid the unnamed "Washington associate" (R. 223–224, 323, 329; G. 109–111). In the Gotham case he conferred with Berman, the actual taxpayer in that case, and Tobias, the Gotham accountant, and pressed upon them the urgency of the case and the wisdom of raising the money for the "man in Washington" (R. 141–142, 144, 165–166). Halperin represented to Berman that his friend in Washington was so influential he could walk into many Senators' offices unannounced, that he had con-

nections in the Bureau of Internal Revenue which enabled him to end cases, that the man would have to be paid well before he used up one of his favors, and that his price was $100,000 (R. 140–142). When Tobias asked the name of the Washington associate he was told it was none of his business (G. 56–57). Payment to the "Washington man" was made contingent on the elimination of criminal prosecution in the New York Special Agent's Office; the result was guaranteed (G. 57–58). After much negotiation, during which Halperin made repeated trips to Washington to have Grunewald lower his price, the sum of $65,000 was agreed upon, $60,000 payable in cash in advance for the Washington associate, and $5,000 by check payable to Schopick and Davis (R. 165–166). Halperin said that the price could be reduced so that the Gotham Beef case could be used as a guinea pig in connection with convincing other people in a larger case that they were handling (R. 165). It was agreed that the $60,000 in cash would be delivered in advance to Halperin, the only one trusted by the Washington associate, and to Greenstein, an accountant representing Berman of the Gotham Beef Company, as joint escrowees pending official word from the Bureau of Internal Revenue that the criminal prosecution had been eliminated (R. 166). Berman collected the cash and turned it over to the two escrowees who put it in a safe deposit box (R. 148, 187). Halperin, though asked many times by Greenstein, the other escrowee, refused to identify the Washington associate for whom he was acting (G. 84).

Thereafter, Kuehl, who had been reviewing the Gotham case, decided the case was too weak to warrant prosecution and reversed the Special Agent's recommendation of criminal prosecution (R. 283). Davis brought Tobias in to hear the decision directly from Kuehl (R. 284). Authorization was then given for release of the money (R. 171, 187). When Halperin took the money from the safe deposit box, he told Greenstein that he would deliver it to Washington (R. 187). Later, in October 1948, Halperin confirmed to Davis that the money had been delivered to Grunewald (R. 328). Davis represented Gotham during 1949 in the negotiations for determining civil tax liability (R. 173, 341).

Halperin also took the lead in dealing with the Pattullo Modes taxpayers, once his "Washington associate" had "promised to help" (R. 329). During the summer of 1948 there were frequent meetings between Halperin and the Pattullo Modes taxpayers (R. 32). Halperin, after reporting to the taxpayers that he had seen his "friend" in Washington and that progress was being made, told Marks, a stockholder of Pattullo Modes, in September 1948, that criminal prosecution could be avoided for $150,000 in cash (R. 32). When Grunewald's last figure was $125,000, Davis and Halperin went to Washington and met Grunewald in his office in the Munsey Trust Building; Halperin conversed privately with Grunewald and later, in Grunewald's presence, told Davis, "Irving, in the Pattullo case Mr. Grunewald has agreed to accept $100,000" (R. 329–330). Davis, after being introduced to Grunewald, thanked him for reducing the price to $100,000

in the Pattullo matter, and Grunewald said, "O. K., O. K." (R. 330).

When agreement was reached on the $100,000 price, Davis explained to Marks that the cash was not to be raised by the sale of securities or by withdrawals from banks as such transactions would be reflected in records (R. 34). The Pattullo taxpayers raised $75,000 through unreported cash sales and borrowed the balance from a friend (R. 27, 35). Upon receiving the money, Davis turned it over to Halperin to be held in escrow in a safe deposit box especially procured for the occasion (R. 331).

The firm of Saver and Schwaeber, (*supra*, p. 5), unaware of the interest of Halperin and Grunewald in the Pattullo Modes case, pursued the voluntary disclosure line of defense in the Special Agent's Office (R. 331). When Baradel, Chief of the Conference Section in the Special Agents' Office, requested an affidavit from Smith (the accountant for Pattullo Modes) setting forth the facts of the voluntary disclosure, Davis prepared a false affidavit which was sent to Saver for submission to Baradel (R. 331). After hearing both Smith and agent Scherm, Baradel ruled that there had been no voluntary disclosure (R. 476, 483–484; G. 154). He testified that "* * * [Smith] had the worst memory I had ever come across in my long experience or * * * he was lying" (R. 484). According to Davis, Grunewald told Halperin that Saver and Schwaeber should be kept in the case to allay their suspicions when the prosecution was dropped (R. 321).

In August 1948, when Bolich ordered Special Agent Clayton to drop his investigation of Pattullo Modes, he gave as his reason that the taxpayers had agreed to cooperate and make available the required information (R. 434; G. 154). During the next three months, Clayton was unable to secure the cooperation of Pattullo Modes, even though he contacted Saver (R. 435). Davis recounted to Halperin the dangers of cooperating without knowing "* * * where we are going for sure" (R. 331–332). Halperin told Davis to have Saver see Bolich in Washington (R. 332). When Saver saw Bolich, Bolich promised him that if the taxpayers cooperated fully there would be no criminal prosecution (R. 332). In the two months that followed, Pattullo Modes cooperated fully with Special Agent Clayton, who was permitted to examine books and records of the firm and net worth statements of individual taxpayers disclosing their unreported income (R. 440). The disclosure was complete except for the unrecorded sales by which the $100,000 cash for Grunewald had been raised (G. 38–40). Special Agent Clayton was unaware that a commitment not to prosecute had been made (G. 144–145). While Clayton was investigating the case, Bolich went to Washington as Assistant Commissioner of Internal Revenue (R. 508). He took up residence in the Washington Hotel in Grunewald's suite and not, as the hotel records show, with Harry Woodring, former Secretary of War (G. 175). The hotel records also show that Bolich was not billed for his room rent. Grunewald paid the bills (R. 521, 537).

Halperin, about the time of Bolich's transfer to Washington, assured Mrs. Segel of Pattullo Modes that there was nothing to worry about as all arrangements had been made and that they simply had to wait for the proper time for the no-prosecution result to be put through (R. 107–108). Halperin was in Grunewald's suite on January 3, 1949 (Gov. Exh. 69; G. 172–174; R. 512–513). On January 4, 1949, the Pattullo Modes taxpayers signed confessions (R. 440). On January 5, Bolich, as Assistant Commissioner in Washington, telephoned Baradel, Special Agent in Charge of the New York fraud bureau, and for the first time disclosed to an Internal Revenue official his promise to the Pattullo Modes taxpayers that there would be no prosecution (R. 475–476). At the time of the telephone call, there had been no official communication to Bolich informing him that the taxpayers had signed confessions (R. 443–444). The only official information Bolich had ever received about the Pattullo Modes case was the sketchy five months' old status report (R. 443–444; G. 145–146). On January 10, 1949, Baradel, faced with Bolich's recently disclosed promise, called a formal conference with the Pattullo Modes principals and announced that a decision had been made not to prosecute (R. 477–478).

On January 13, 1949, Halperin, Hoffman, Schopick, and Davis removed from the safe deposit box the $100,000 in cash delivered by the Pattullo Modes principals (R. 227–228). On the same day, Hoffman and Halperin left for Washington by train taking the money with them (R. 229). Grunewald met the train

at Union Station in Washington and he and Halperin walked off together with the money (R. 230). Washington hotel records show that Halperin checked in at the hotel on January 13, 1949, and checked out in a few hours. The room rent was charged to Grunewald (Gov. Exh. 70; G. 173–174). Halperin later reported that he had delivered the money to Grunewald (R. 335).

During the rest of 1949, while an audit to determine the amount of the Pattullo tax liabilities and civil fraud penalties was being conducted, the Pattullo taxpayers were cognizant of the danger of the audit "* * * upsetting the applecart * * *" (R. 128–129). A sum of $25,000 to $40,000 was requested from Pattullo Modes for the "boys in New York", so that on a detailed examination of the civil tax liability no one would "* * * raise a fuss about the phony deal that had been put through" (R. 42, 128; G. 29). The civil tax audit and determination of tax liability for Pattullo Modes for the years 1942–1946 was completed late in 1950 (R. 470–471; G. 7).

In November 1949, ten months after the decision not to prosecute, Special Agent Clayton's report was sent to Bolich by Baradel (R. 478–479). The report stated that Bolich's commitment to the Pattullo taxpayers was the only reason that prosecution was not recommended (Gov. Exh. 56). Bolich, on receiving the report, called Baradel at his home on a Sunday and asked him to write an explanatory memorandum to "* * * take a little heat off the situation" (R. 479).

In June 1950, Hoffman, business solicitor for Schopick and Davis, learning of a case in which the indicated tax evasion was between $750,000 and $1,000,000,

made contact with another group of taxpayers known to this record as the Glovers (R. 342–345). At a meeting with the Glovers, Halperin and Davis stated that the case could be handled by a "person in Washington whom we had used in other cases" for a substantial sum in cash (R. 345). Grunewald established his price with Halperin as between $175,000 and $200,000 (R. 351). When the Glovers rejected this amount, Halperin made another trip to Washington in an attempt to reduce the price (R. 351). Since the Glovers refused to pay more than $100,000, the Davis firm refused to handle the case (R. 351). Between the time of the Glover negotiations and early 1951, Halperin made as many as ten trips to Washington to visit Grunewald (R. 539).

In the same summer of 1950, Bolich, who was still Assistant Commissioner of Internal Revenue, borrowed the Washington Hotel records of his occupancy in the hotel for the preceding year because he "* * * just wanted to review his bills of approximately a year back" (G. 165). When the so-called King Committee of the House of Representatives subpoenaed these hotel records a year later in December 1951, the hotel management wrote to Bolich requesting him to return the records (G. 168). Bolich denied ever receiving the records (G. 169). It was during the period covered by the missing records that Bolich was living in the Grunewald suite which was carried in the name of Harry Woodring (G. 172).

In September 1950, Bolich hired Daniel Olsen, a carpenter from Brooklyn, New York, to do some work

for him in his home there (B. 21). Olsen testified that on Bolich's instruction he opened up the baseboard in the clothes closet in the upstairs room for a compartment that could be used to store papers (B. 21; R. 553–554). He said that Bolich told him it was to be a hiding place for secret Washington papers (R. 555).

Early in 1951, the King Subcommittee of the House Committee on Ways and Means began its investigation of the Bureau of Internal Revenue. In the summer of 1951, the Subcommittee called for the Bureau of Internal Revenue file on the Pattullo Modes case (G. 143). Bolich learned of this congressional request from Baradel (G. 156–157). Halperin suggested the taxpayers be contacted at once (R. 360). Marks and Mrs. Segel, Pattullo taxpayers, were called in to the offices of Schopick and Davis, and in the presence of Halperin, were given strict instructions to talk to no one about the case, particularly not to investigators (R. 360–361).

An investigator from the Subcommittee learned from an inadvertent remark of Mrs. Segel that a false claim of voluntary disclosure had been made (R. 361–362). Her statement to the investigator directly contradicted the affidavit filed by Smith, the accountant for Pattullo Modes, in support of the voluntary disclosure scheme (R. 362). When Smith was subpoenaed to appear before the Subcommittee, he followed the advice of Davis that he stick to his affidavit and he gave false testimony (R. 96, 363). When Davis was called before counsel of the Committee, he too lied about the affidavit (R. 364–365). Halperin

stated that Grunewald was aware of the situation and was prepared to help if he could (R. 369–370). When Smith was arrested on August 30, 1951, Halperin Davis, Hoffman, and Schopick met to decide on a course of action (R. 365). Davis reported that the Pattullo people would invoke the Fifth Amendment if questioned (R. 366–367). They all said they would stand pat (R. 365–366).

In February 1952, a Grand Jury was empaneled in the Eastern District of New York to investigate violations of the internal revenue laws and their administration and enforcement (G. 142–143). Revenue agents examined the books and records of the law firm of Schopick and Davis and of accountant Smith (R. 367). Halperin, Hoffman, Davis, and Schopick discussed the handling of the grand jury (R. 366). During the next few months the grand jury subpoenaed Deutsch, Hoffman's brother-in-law (who had been connected with the initial contact in the Pattullo Modes case), Hoffman, Halperin, Schopick, Davis, the Pattullo taxpayers, the Gotham taxpayers, and Grunewald's personal secretary (R. 49, 152, 369, 541).

Revenue agents found a $500 check from Smith's accounting firm payable to Deutsch for his service in contacting the Pattullo Modes taxpayers in 1947 (R. 367). When Smith was subpoenaed before the grand jury, Schopick told him to state that the $500 check was merely an indirect loan from Hoffman to Deutsch (R. 98–99, 367).

Halperin, Davis, Schopick, and Hoffman met on another occasion and decided that the Pattullo taxpayers should be persuaded to continue withholding

information from the investigators (R. 368). Davis told Marks, a Pattullo stockholder, that he "* * * would be crazy to talk * * *" and implored him not to do so (R. 368, 49–50). Davis also saw Mrs. Segel, another person directly interested in Pattullo, and urged that the Pattullo people should be silent before the grand jury about what had transpired in their case (R. 117–118). However, they decided to tell their story to the grand jury (R. 50–125).

In early 1952, Halperin and Davis told Tobias of the Gotham Beef Company that no one had talked about the Gotham case (R. 172). They said that if everyone was quiet the investigation would blow over (R. 172). In February 1952, they again visited Tobias and told him that he, Tobias, and Berman should remain silent; that Halperin had done Berman a good turn and Berman should not hurt him by talking (R. 173). The Pattullo Modes people had testified before the grand jury before Halperin again saw Tobias (R. 173). When Halperin did meet Tobias, he sought to persuade Tobias and Berman to remain silent, stating that the "Washington associate" was going to "stand silent"; that he, Halperin, would be silent; and it would be a terrible thing for him if they testified (R. 173–174).

In May 1952, Nancy Hain, Grunewald's personal secretary, was subpoenaed to appear before the grand jury (R. 541). She knew that Halperin had visited Grunewald often; that Bolich had lived in Grunewald's suite at the Washington Hotel for a time; that Grunewald used the name "Captain Henry"; and that

Grunewald was in the "tax business" (R. 536–541). Immediately after she was subpoenaed, Grunewald phoned and offered to furnish her money for a trip to New York. He told her that she "* * * didn't need to discuss it, and * * * [she] could just say [she] didn't remember" (R. 541–543). Grunewald's messenger arrived that night with the money for her (R. 543). Nancy Hain, before the grand jury, falsely stated in answer to questions put to her by the United States Attorney that she didn't remember (R. 545).

In submitting the first conspiracy count to the jury, the trial court pointed out that the indictment charged that the conspiracy comprehended within it a conspiracy to conceal the true facts from investigation, should investigation thereafter eventuate, and that this was an important element in view of the three-year statute of limitations (R. 750). He charged (R. 751–753):

> To determine whether certain of the alleged overt acts were in furtherance of the object of the conspiracy, you have to determine the duration of the conspiracy. Did it end when the Pattullo Modes people and the Gotham Beef people received an assurance of no prosecution from the Bureau of Internal Revenue, or was a part of the conspiracy a continuing agreement to conceal the acts done pursuant thereto? In determining whether a part of the conspiracy was an agreement to continue to conceal the illegal acts after their consummation, you may not imply that such an agreement was part of the conspiracy. You would have to find from

the evidence of the acts and declarations of the co-conspirators that there was an understanding or agreement to conceal the conspiracy. If you find that such an agreement or understanding to conceal the conspiracy was not a part of the conspiracy to defraud the government, but no more than an afterthought brought to the surface when the co-conspirators were confronted with the Grand Jury and King Committee investigations, then you must find, as a matter of law, that the defendants are not guilty of the crime charged in the first count of the indictment. If you find that the evidence shows, beyond a reasonable doubt, that as a part of a conspiracy to defraud the government, there was an agreement or understanding to conceal the illegal acts and that this too was an objective or part of the conspiracy, then you may find that such understanding was a part of the conspiracy. However, you must additionally determine whether this objective of the conspiracy was known to the defendants. If this objective was known originally by only part of the conspirators but thereafter during the existence of the conspiracy, the scope of the conspiracy was extended so as to include such an agreement to conceal, and if you find that some of the defendants did not know of the expansion to include the agreement to conceal, you may not impute to them the knowledge of their co-conspirators and they could not be found guilty of the crime charged in Count One.

Now, therefore, as to the defendants Halperin, Grunewald, and Bolich, you have the questions of fact, first, as to whether they became parties to a conspiracy to defraud the

United States, and that part of this conspiracy was to make continuing efforts to avoid detection and prosecution by any governmental body; second, whether they knew the general objectives of the conspiracy; and third, whether any one of the conspirators took any overt act within three years prior to October 25, 1954 to accomplish the result of that conspiracy. If you can answer these questions all in the affirmative, beyond a reasonable doubt, then you would be justified in returning a verdict of guilty on the first count of the indictment as against each one of these three defendants. If you cannot find that you can answer these questions in the affirmative, beyond a reasonable doubt, as to these three defendants, then as to the ones concerning whom you cannot so answer it, you should return a verdict of not guilty.

ARGUMENT

1. Admittedly, the only overt acts alleged and proved to have been committed within the three-year period preceding the return of the indictment (on October 25, 1954) were acts of concealment. Petitioners argue that such overt acts were not sufficient to toll the statute of limitations; that the actual conspiracy had ended more than three years before the return of the indictment; and that their acts of concealment must be viewed either as individual and independent efforts of the petitioners to cover up their wrongdoing or as the consequences of a new and separate conspiracy entered into subsequent to the completion of the conspiracy charged in the indict-

ment (No. 183, Pet. 8–14; No. 184, Pet. 17–21; No. 186, Pet. 12–13).

As appears from the portion of the charge quoted in the Statement (*supra*, pp. 19–21), the case was submitted to the jury with specific instructions that petitioners could be found guilty only if the jury found that agreement to conceal was part of the original conspiracy to defraud the government, not "an afterthought" inspired by the King Committee investigations. And the jury were also expressly charged that they could not, merely from the crime itself, "imply that such an agreement was part of the conspiracy" (R. 752), but that such an original agreement to conceal must have been shown by the evidence. Hence, the basic question on this aspect of the case is not, as petitioners endeavor to present it, whether one may imply agreement-to-conceal simply from the conspiracy to defraud, but whether a conspiracy to defraud the government can ever embrace, as an actual part thereof, an agreement to conceal the wrongful activities.

Judge Frank, in his dissenting opinon on the petition for rehearing (Vol. V. App. 380–393), takes the position that concealment could be part of the conspiracy to defraud only if the agreement to conceal, and the acts of concealment, were "to block prosecution of the taxpayers for tax evasion" (Vol. V. App. 383, 387). He seems to read the decisions of this Court in *Krulewitch* v. *United States*, 336 U. S. 440 and *Lutwak* v. *United States*, 344 U. S. 604, as holding that *no* conspiracy charge can ever embrace an agreement to conceal the crime that was the object

of the conspiracy, no matter what the evidence of such an actual agreement to conceal. But nothing in those decisions supports that view; rather, they assume the contrary. While the Court in *Krulewitch* refused to infer from acts of concealment, following the completion of the substantive offense, an agreement to conceal as part of the original conspiracy, it did not deny that an agreement to conceal could have been factually a part of the conspiracy when first devised. Mr. Justice Jackson, concurring, stated (pp. 455–456):

> * * * Of course, if an understanding for continuous aid had been proven, it would be embraced in the conspiracy by evidence and there would be no need to imply such an agreement. Only where there is no convincing evidence of such an understanding is there need for one to be implied.

Similarly, in *Lutwak*, the Court did not question the propriety of the allegation in the indictment that the conspiracy included an agreement to conceal the fraud charged, but held (344 U. S. at p. 616) only that

> * * * there is no evidence in the record to establish as a part of the conspiracy that the conspirators agreed to conceal the conspiracy by doing what was necessary and expedient to prevent its disclosure.

This statement implies that if the evidence had shown that the original agreement did contemplate acts of concealment, overt acts of concealment could have supported the charge.

On principle there is no reason why a conspiracy to conceal acts of wrongdoing cannot be part of a con-

spiracy to defraud. The government is defrauded by any act which impairs honest administration. *Haas* v. *Henkel*, 216 U. S. 477. When corrupt officials and their confederates deliberately plan, not only to act dishonestly, but to keep the dishonesty from being discovered and corrected, they are as clearly impairing the functions of government by the concealment as by the original fraud. The whole scheme is one continuous plan to defraud and injure the United States.

Thus, the question on the statute of limitations in this case comes down to the issue of whether the evidence supports the finding, which under the charge the jury had to make, that from its inception the conspiracy embraced an agreement, known to all the petitioners, not only to act corruptly in relation to tax cases, but to conceal and cover up the acts of wrongdoing. And, in this connection, the conspiracy cannot be treated, as petitioners would have the Court do, as relating to separate, isolated tax cases. So far as these petitioners are concerned, the majority of the court below were clearly justified in stating on the basis of this record that the "proof of * * * a single, overall conspiracy is simply overwhelming" (Vol. V. App. p. 291).

The conspirators had worked out and developed an organization for "fixing" tax cases pending against tax evaders. The organization, extending between New York and Washington, included a high official in the Bureau of Internal Revenue who had power to dispose of tax cases, contact men in both cities, a firm of attorneys to act as a front, and "chasers" to discover clients who might be in tax trouble. The conspirators

were so organized as to be able to give assistance to taxpayers who could meet their price. Their handling of the Gotham Beef Company case and the Pattullo Modes matter were but two operations of the one conspiracy, not two separate conspiracies as petitioners contend. The contact and negotiations with the Glovers, although futile, formed another episode in the working of the conspiracy. The over-all organization and methods used by petitioners mark their activity as one broad, continuing conspiracy.[5]

This type of continuing, broad-scale scheme, by its very nature, normally embraces as an integral part agreement as to the necessity for constant and continuous concealment beyond that involved in the implied understanding of ordinary conspirators that crime will not be disclosed. The difference is analogous to the well-defined distinction made under the mail fraud statute between use of the mails after a fraud has been completed and use of the mails, as in a check-kiting scheme, to conceal a particular aspect of a continuing project. See *Kann* v. *United States*, 323 U. S. 88, 94–95.

There is no need, however, to rely only on the intrinsic nature of the scheme as showing that agreement to conceal was part of the conspiracy to defraud. There is in this record ample evidence establishing the understanding of all the petitioners that there was a constant and continuous necessity for active acts of con-

[5] The argument that more than one conspiracy was proved is separately made by petitioner Bolich (No. 186, Pet. 14) and raised as a question, but not argued, by petitioner Halperin (No. 184, Pet. 4).

cealment at all times, from the beginning of the conspiracy down into 1952 when the overt acts charged in the indictment were committed. In all the negotiations as to price with the Glovers, the Gotham Beef Company, and Pattullo Modes, the conspirators took great care not to reveal the identity of their "Washington associate". Undoubtedly for the same reason, Grunewald had himself referred to as "Captain Henry". And the need for such concealment continued to be recognized well into 1952, when Halperin again told Tobias of the Gotham Beef Company as he had told him before, that it was none of his business whether Grunewald was that Washington associate (R. 173). Other factors of concealment were the use of cash instead of checks; the emphasis on personal visits; the directions to Pattullo as to how to raise the money for the "Washington associate" (*supra*, p. 11).

It is also clear that all parties recognized the need for concealment long after the decisions not to prosecute were reached in the Pattullo Modes and Gotham Beef cases. This is so, not only because of the continuing nature of the general conspiracy, but also in relation to those particular cases because the results reached could have become undone if there were not constant unremitting vigilance. Certainly, so long as civil liability was being determined, the necessity for active efforts to conceal was self-evident. The understanding of the need for continued deception is particularly evidenced by the fact that Pattullo Modes paid $40,000 during the pendency of the civil proceedings to make certain that no questions were raised as to the prior criminal determination (see *supra*, p. 14).

It is in this connection—and that is properly its only relevance—that the majority of the Court of Appeals pointed out (Vol. V. App. pp. 302–303) that the six-year statute of limitations did not run in favor of the taxpayers until 1952, so that the concealment was necessary "not only to protect the conspirators from a conspiracy prosecution but also to protect the taxpayers from a tax evasion prosecution."

Under these circumstances, the fact that the petitioners could not in the beginning have foreseen the particular contingency represented by the King Committee investigation is, as the majority below held (Vol. V. App. p. 304), unimportant. So long as the conspiracy of which they were a part was known to them to require active steps of concealment while they were in cooperation with each other and while their "fixed" tax cases were not fully closed, it was not necessary that the conspirators know in advance the precise events which would call for the carrying out of their agreement to conceal. It was enough that the acts done were of the type contemplated by the original agreement. Cf. *Pinkerton* v. *United States,* 328 U. S. 640; *United States* v. *Perlstein,* 126 F. 2d 789 (C. A. 3), certiorari denied, 316 U. S. 678.[6]

Recognition of the continuous nature of the conspiracy-to-conceal revealed by the particular facts of

[6] Petitioner Grunewald argues in effect (No. 183, Pet. 2–3, 11) that the evidence as to conspiracy to conceal must be held insufficient as to him because he was acquitted by the court on the specific counts (5, 6 and 7) relating to attempts to influence the testimony of witnesses Marks, Berman and Tobias before the Grand Jury. But, as the argument in the text has developed, those specific acts of concealment were only one manifestation of

this case will not, as petitioners argue, mean that any conspiracy can be indefinitely extended beyond the period of limitations. The judgment of the courts below is based on the factual realities of this case in which the indictment charged and the evidence proved an agreement which from the start contemplated active and continuing acts of concealment involving strong and constant cooperation among the conspirators throughout the period, in relation both to their general activities and to the particular tax cases which had not been fully closed during the whole period covered by the indictment. The bar of the statute of limitations is not being denied to conspirators after years of inactivity and separation. Here, the jury found, as the facts justified, that petitioners were, within three years of the indictment, engaged in continuous acts of cooperation deliberately to thwart the law, pursuant to their known and previously-established agreement.

2. All three petitioners contend (No. 183, Pet. 15–16; No. 184, Pet. 10–17; No. 186, Pet. 17–18) that the trial court erred when it permitted the government to impeach the credibility of petitioner Hal-

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the broader and earlier understanding that the conspirators would cover up and conceal their wrongdoing, an understanding in which the jury properly found that Grunewald participated. The great efforts made to conceal his identity from the very beginning, including his refusal to deal with anyone but Halperin and to accept any payment but in cash, clearly establish that agreement-to-conceal was part of the conspiracy in which he joined, and his continuing participation in that effort was shown by his own acts in endeavoring to have his secretary "forget" the alias under which he made contact with Bolich (see the Statement, *supra;* pp. 18–19).

perin, who had taken the witness stand to testify in his own behalf, by showing on cross-examination that he had previously, when appearing before a grand jury under subpoena, invoked the Fifth Amendment privilege against self-incrimination in response to similar questions. The court's ruling was required by the decision in *Raffel* v. *United States*, 271 U. S. 494. *Raffel* held that a defendant who had taken the stand to testify for himself during a second trial on a conspiracy charge could properly be questioned on cross-examination as to his failure to take the stand in his own behalf during the first trial. In reaching this conclusion, the Court relied upon the rule that immunity from self-incrimination may be waived by a defendant who wishes to offer himself as a witness. Mr. Justice Stone, writing for a unanimous court, stated (at p. 499):

> The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness. We can discern nothing in the policy of the law against self-incrimination which would require the extension of immunity to any trial *or to any tribunal other than that in which the defendant preserves it by refusing to testify.* (Emphasis added.)

Under this broad language, the fact that the refusal to testify in this case occurred before a grand jury, while in *Raffel* it took place at a prior trial, is without

significance. The same principle applies to both situations. See *Viereck* v. *United States*, 139 F. 2d 847, 851 (C. A. D. C.), certiorari denied, 321 U. S. 794; *United States* v. *Klinger*, 136 F. 2d 677 (C. A. 2), certiorari denied, 320 U. S. 746, both involving claims of privilege before a grand jury.

Petitioners, relying in large measure on the first dissenting opinion of Judge Frank (Vol. V. App. pp. 316–357), urge that *Raffel* has been nullified by the subsequent decisions of this Court in *Johnson* v. *United States*, 318 U. S. 189 and *Slochower* v. *Board of Higher Education*, 350 U. S. 551. But there is a radical difference between the facts in those cases and the situation before the Court in *Raffel* and here.

In the *Johnson* case the defendant, on trial for wilful evasion of income taxes for 1935, 1936 and 1937, took the witness stand in his own behalf. When asked by the government about his income in 1938, he claimed his Fifth Amendment privilege against self-incrimination and refused to answer. Although the trial court upheld his claim of immunity, it allowed the government to comment on his refusal to answer in summation to the jury, and instructed the jury that the refusal could be considered in assessing the defendant's credibility. This Court, acknowledging that it was error for the trial court to uphold the defendant's claim of privilege once he had taken the stand to testify for himself, ruled that the trial court, having sustained the privilege, erred in allowing the government to comment on, and the jury to consider, the claim of privilege. The Court ruled, in substance, that the trial court was estopped by its own error. Thus, *Johnson*

involved comment on a claim of privilege in the very same trial where the privilege was claimed and allowed; in *Raffel* and here, the comment was on a claim of privilege made in a prior proceeding by a defendant who later elects to testify. *Johnson* concerned the consequences immediately flowing from an accepted claim of privilege; *Raffel* and this case involve, on the other hand, the effect of the exercise of the right of a defendant to testify in his own behalf. Since *Johnson* cannot fairly be read as overruling *Raffel*, even by implication, there is no need to reconsider in this case the problems set at rest in *Raffel*.

Nor does the *Slochower* case give support to petitioners. There, the Court held that the application to Slochower of the New York law which provides automatic dismissal for any city employee who invokes the privilege against self-incrimination violated the due process clause of the Fourteenth Amendment. This holding includes a reaffirmation of the established principle that no inference of guilt can be drawn from the claim of constitutional privilege. But it does not follow from this ruling that, where, as here, the privilege has been deliberately and voluntarily waived at a trial, a former claim of privilege has no relevance to the truth of the defendant's present testimony. While the *Slochower* case decided that the immunity given by the Fifth Amendment was to be accorded a wide reach, *Raffel* determined that a waiver of the privilege was also complete. The two cases are not antipathetic; they deal with converse problems.

As a corollary to the main argument, petitioner Halperin asserts (No. 184, Pet. 14–16) that the trial

court erred when it refused to instruct the jury that "an innocent man may honestly claim that his answers may tend to incriminate him." However, it is not error to refuse to instruct in language submitted by counsel if the charge given correctly states the law applicable to the case. *Sugarman* v. *United States*, 249 U. S. 182, 185; *United States* v. *International Fur Workers Union*, 100 F. 2d 541, 546 (C. A. 2), certiorari denied, 306 U. S. 653. That was done here. The court instructed the jury that petitioner Halperin had a right to invoke the privilege before the grand jury, that his act of invoking the privilege could not be considered as proof of his guilt of the crimes charged against him, and that his act of claiming the privilege could be considered only in weighing the credibility to be given to his testimony at the trial (R. 768).

3. Another contention urged by the three petitioners relates to the testimony of Davis on his redirect examination that in March 1952 he told his attorney the facts concerning the $100,000 and the $60,000 payments made by Pattullo Modes and Gotham Beef to the conspirators and authorized his attorney to communicate the statement hypothetically to the United States Attorney (No. 183, Pet. 16–17; No. 184, Pet. 22–23; No. 186, Pet. 17).

Davis' cross-examination had revealed several facts that tended to impeach his credibility. It was shown that he had been indicted in April 1954 for tax evasion based on alleged failure to report $160,000 as taxable income in 1948 and 1949; he had also pleaded guilty

to an indictment for conspiracy. In 1953, his wife had sued him claiming that he held $125,000 in cash as a joint tenant with her. These facts were pointed to as furnishing a motive for Davis to fabricate his testimony. The 1952 statement by Davis to his attorney was made when no indictments had been found against Davis and suit had not been brought against him by his wife. The statement was proffered and received on the theory that the jury might find that it was made at a time when the motive to falsify did not exist, and therefore give it some weight on the issue of his credibility.

When the veracity of a witness has been challenged on the ground that he has a motive to lie, statements consistent with what he said on the stand, but made before the motive to fabricate arose, are competent. *Ellicott* v. *Pearl,* 10 Pet. 412, 439; *Di Carlo* v. *United States,* 6 F. 2d 364, 366 (C. A. 2); *Dowdy* v. *United States,* 46 F. 2d 417, 424 (C. A. 4). Where it is reasonable for the jury to find that the prior statement did in fact antedate the motive, the court should admit the prior statement. *Di Carlo* v. *United States, supra,* at 367. The contention here that the motive to fabricate antedated the prior statement is purely speculative. While Davis may have sensed an impending change in the fortunes of the conspiracy, he could not then have known that he would be twice indicted and sued by his wife. It was entirely reasonable for the trial court to conclude that there was no motive to fabricate, such as existed at the time of trial, when the

statement was made, and, therefore, to leave the matter to the jury.[7]

4. Petitioner Halperin argues (No. 184, Pet. 16–17) that he was denied due process when he was subpoenaed, before he was indicted, to appear as a witness before a grand jury, other than the one which indicted him, in an investigation which could have implicated him as a potential accused.[8] By his argument, petitioner implicitly equates the position of a witness before a grand jury with that of a defendant on trial before a petit jury. The law has never recognized such an assimilation.

Every citizen is under a clear duty to aid in the administration of justice by giving truthful testimony when called upon to do so (*Blair* v. *United States*, 250 U. S. 273, 281), whether it be before a court, a grand jury (*Blackmer* v. *United States*, 284 U. S. 421, 438), or a committee of Congress (*United States* v. *Bryan*, 339 U. S. 323, 331). Any exception from this positive rule must be justified by the need to protect a very real interest. *United States* v. *Bryan, supra.* The fear of a witness that he may be indicted by a grand jury has not been recognized as a valid excuse for not

[7] Characterizing the prior statement of the witness as "hypothetical" is inaccurate. The statement, accurately presenting all the intricate workings of the conspiracy, was made to the witness' attorney without qualification. The only restriction imposed by the witness on the attorney was that, when the latter would repeat the statement to the United States Attorney, he should present it as a hypothetical situation. The limitation on the repetition does not destroy the value of the clear statement made by Davis to the attorney.

[8] This question was not presented to nor considered by the court below.

appearing or for quashing an indictment if he does appear and is indicted. *United States* v. *Scully*, 225 F. 2d 113, 116, 118–9 (C. A. 2); cf. *Wilson* v. *United States*, 162 U. S. 613, 623–4; *Powers* v. *United States*, 223 U. S. 303, 313–4.

Moreover, the record does not support Halperin's claim that he was the "target of the Grand Jury investigation," that he was a *de facto* accused, or that he was improperly prejudiced. There is nothing in the record that indicates that he, rather than any other person, was the object of the particular grand jury investigation of fraud in the administration of the internal revenue laws. Nor was he legally prejudiced in being called. He is an attorney who has practiced law for many years, and he sought advice of counsel before he appeared before the grand jury in response to the subpoena. That he was fully cognizant of his rights was thoroughly demonstrated by the fact that he invoked the Fifth Amendment.

5. Petitioner Halperin, who contended before the court below that the evidence was insufficient to sustain his conviction on counts 5, 6 and 7, now raises the same question by arguing that the court ruled that he, an attorney, was guilty of corruptly attempting to influence a witness before a grand jury by advising the witness to plead the Fifth Amendment (No. 184, Pet. 24–26). The evidence adduced at the trial establishes that his characterization of the holding below is incorrect.

Count 5 charged that Halperin, on March 15, 1952, aided and abetted Davis, Hoffman, and Schopick in corruptly endeavoring to induce Morton Marks, a

Pattullo Modes stockholder, to give false evidence or to withhold the truth from the grand jury. The evidence showed that in early March 1952, after the Pattullo Modes stockholders had retained new counsel, Davis at last succeeded in obtaining a meeting with Morton Marks, one of the stockholders, who was about to testify before the grand jury. When Marks told Davis that he would be guided by advice of counsel before the grand jury, Davis stated, "Well, you can't talk. You would be crazy to talk. * * * Morton, are you going to turn me in?" (R. 49–50). There was also evidence of a March 1952 meeting attended by Halperin, Davis, Schopick, and Hoffman, at which it was agreed that Davis should try to communicate with witness Marks. The jury was clearly justified in finding that, when Davis contacted Marks, he did what Halperin and the others intended he should do. *Nye & Nissen* v. *United States*, 336 U. S. 613, 619–620. And these acts, as the court below held, plainly constituted an improper tampering with a witness. *United States* v. *Russell*, 255 U. S. 138, 143; *Hicks* v. *United States*, 173 F. 2d 570 (C. A. 4), certiorari denied, 337 U. S. 945.

Counts 6 and 7 charge Halperin with corruptly endeavoring, on March 15 and 18, 1952, to influence Berman and Tobias, who were connected with Gotham Beef, to withhold information when they were called before the grand jury. The evidence showed that Halperin knew that Berman and Tobias expected to be subpoenaed before the grand jury. It also established that Davis, acting for the conspirators, first met with Berman and Tobias and asked them not to talk

when called before the grand jury. Several days later, when Halperin met Tobias and Berman, he told them that the Pattullo Modes people had talked to the grand jury, that it was a terrible thing, and that he hoped that Berman would not do the same as he had done Berman a good turn. Halperin then informed Tobias and Berman that neither he, Halperin, nor his Washington associate would talk (see the Statement, *supra*, p. 18). On the basis of the evidence, the jury was warranted in finding Halperin guilty on counts 6 and 7.

The argument that Halperin acted as an attorney when he advised the witnesses Berman and Tobias to invoke the Fifth Amendment before the grand jury is totally unfounded. Tobias' testimony was that Halperin never specifically mentioned the Fifth Amendment to the witnesses, saying only that he hoped the witnesses would not talk (R. 183–184). Nor was there any evidence that an attorney-client relationship subsisted between Halperin and the witnesses at the time he talked to them; indeed, the testimony that he requested their silence because they owed him a favor negates the idea he was acting as an attorney advising them. In the absence of any showing that he was their attorney, he cannot rely on *United States* v. *Herron, et al.*, 28 F. 2d 122 (D. Calif.), holding that an attorney may not properly be charged with conspiring corruptly to influence a witness when he advises his client, a witness, to invoke the Fifth Amendment.

6. The contention of petitioner Bolich (No. 186, Pet. 14–15) that the evidence was insufficient to sus-

tain his conviction is answered by the opinion below (Vol. V. App. pp. 295–299). As appears from the Statement, *supra*, his conviction rests on far more than his friendly relationship with Grunewald. The jury could validly infer Bolich's role in the conspiracy from his own actions in the Pattullo, Modes and Gotham cases, following Grunewald's intervention and his calls in the name of "Captain Henry". Moreover, Bolich's actions in endeavoring to have a report on the Pattullo Modes case modified, and the testimony that he had obtained, and later denied, having the records of his occupancy of the Grunewald apartment, indicate a consciousness of guilt as well as overt acts of concealment. The subsidiary argument that the testimony as to the hotel records, and as to the construction of a hiding place for papers in September 1950, was improperly admitted (No. 186, Pet. 16–17), is without merit. This testimony was clearly pertinent enough to the main charge to be admissible in the trial court's discretion.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 183

HENRY W. GRUNEWALD, PETITIONER

v.

UNITED STATES OF AMERICA

No. 184

MAX HALPERIN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 186

DANIEL A. BOLICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (Vol. V, App. 288–357, 380–393) are reported at 233 F. 2d 556.

JURISDICTION

The judgment of the Court of Appeals was entered on April 10, 1956 (Vol. V, App. 358) and petitions for rehearing were denied on June 1, 1956 (Vol. V, App. 394). The petitions for writs of certiorari were filed on June 21, 1956, and were granted on October 15, 1956 (R. 984). 352 U. S. 866. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The questions, as limited in the order granting the writs of certiorari (R. 984–988) (352 U. S. 866),[1] are:

(a) No. 183

1. Whether conviction of a conspiracy to procure from the Fraud Bureau of the Internal Revenue Department a decision not to prosecute a tax fraud, where the object of the conspiracy had been accomplished by January, 1949, and prosecution was barred under the statute of limitations by January, 1952, may be sustained, on the theory that the conspiracy must have included a continuing agreement to conceal—the indictment having been found October 25, 1954, and the proof being that one or more of the conspirators in March, 1952, attempted to cover their tracks from investigators.

2. Whether independent acts of alleged conspirators, after the accomplishment of the object of the conspiracy and done without the

[1] The phraseology of these questions is taken directly from the petitions for writs of certiorari. They contain assumptions which we believe to be contrary to fact and which tend to make answers in favor of petitioners inevitable. We try to set these matters straight in the course of the Argument, *infra*, pp. 45–46, 85, 97–98.

knowledge or the participation of the petitioner Grunewald, may suffice to support a charge against him that the original conspiracy included a continuing purpose to conceal so that the conspiracy might be deemed to extend down to the last act of concealment.

3. Whether an alleged continuing conspiracy to conceal could be found as to the petitioner Grunewald, when he was concerned only with the original object of the conspiracy and was acquitted by the Trial Court on three counts of attempting to influence witnesses, which the Court charged the jury could be acts of continuing concealment.

4. Whether a purpose to continue to conceal the accomplishment of the primary conspiracy may be inferred from the fact that the conspirators would be presumed to know that their activities would always be open to investigation—whether a subordinate conspiracy to conceal may be implied from the original crime.

5. Whether the Trial Court committed error in permitting the jury to find a continuing conspiracy to conceal from the fact that, more than three years after the object of the conspiracy had been accomplished, the petitioner Grunewald, when his secretary was subpoenaed before a grand jury, told her she need not answer various questions and could say she forgot.

6. Whether the Trial Court committed error in permitting the defendant Halperin, the only witness for the defense, to be cross-examined, for the purpose of impeaching his credibility, on the fact that he had been, prior to the trial, subpoenaed before a grand jury and had there claimed his constitutional privilege against self-

incrimination on a long line of questions. The constitutional privilege thus infringed is that part of the Fifth Amendment which reads "* * * nor shall be compelled in any criminal case to be a witness against himself * * *."

No. 184

1. When a defendant testifies in his own defense at his trial, and his answers to questions show that, although averring his innocence, he was justified in invoking the Fifth Amendment with regard to like questions before a Grand Jury—as in this case all agree—is not that defendant denied due process when the Government on cross-examination brings out before the trial jury, the fact that he refused to answer the questions before the Grand Jury, upon such constitutional grounds?

2. When a defendant has been subpoenaed to testify before a Grand Jury in an investigation, of which he is a primary target, has claimed his Constitutional privilege, advised the Grand Jury that he was doing so as an innocent man ensnared in suspicious circumstances and because he could not cross-examine or be represented by counsel, may the trial court charge the jury that they may consider his refusal to testify before the Grand Jury on the score of his credibility, although his trial testimony was entirely consistent with his position before the Grand Jury?

3. Under the circumstances surrounding a defendant's appearance before a Grand Jury as set forth in the last preceding paragraph, does not the Court's instruction as aforesaid illegally impeach and impede the defendant's statutory right to be a witness in his own behalf?

4. Does the rationale of *Raffel* v. *United States*, 271 U. S. 494, apply to prior invocation of the Fifth Amendment before a Grand Jury as distinguished from such action at a prior trial?

5. Does not the doctrine and rationale of *Slochower* v. *Board of Higher Education*, decided by this Court April 9, 1956, compel the conclusion that a defendant under the circumstances aforesaid, is denied due process of law when he is examined by the Government and compelled to admit that he refused to answer questions before the Grand Jury, and the Trial Court advises the jury they may consider that refusal on the subject of his credibility?

6. Is not a defendant, particularly one who asserted that he was invoking the Fifth Amendment as an innocent man being plotted against and beset by suspicious circumstances entitled to have the jury charged, "An innocent man may honestly claim his answers may tend to incriminate him"?

8. Does not the opinion of the Court of Appeals that the statute of limitations against conspiracy was not tolled, in that certain overt acts of concealment when committed were chargeable to the original conspiracy disregard and deny effect to this Court's views on proof of subsidiary concealment conspiracies, as set forth in *Krulewitch* v. *United States*, 336 U. S. 440, and *Lutwak* v. *United States*, 344 U. S. 604?

9. Does not the conclusion of the Court of Appeals herein that a single conspiracy rather than a multiplicity of conspiracies are disclosed by the record, run counter to this Court's de-

cision in *Kotteakos* v. *United States*, 328 U. S. 750?.

No. 186

1. Whether the three year Statute of Limitations, applicable to the charge of conspiracy, barred conviction of the petitioner Bolich inasmuch as the objective of the alleged conspiracy had been achieved by January, 1949—more than five years before the date of the indictment which was filed on October 25, 1954.

2. Whether multiple conspiracies were established by the evidence, rather than a single general conspiracy, to the substantial prejudice of the rights of the petitioner Bolich.

6. Whether the trial Court committed prejudicial error in permitting the government to elicit from the defendant Halperin upon his cross-examination that he had invoked the Fifth Amendment at a Grand Jury hearing and the trial Court charged the jury that they might consider Halperin's claim of constitutional privilege as adversely affecting his credibility.

(b) No. 184

7. Does it constitute due process to subpoena a person to testify before a Grand Jury in an investigation of which he is a primary target, and thereby permit an examination before trial of a *de facto* defendant?

11. Does a lawyer who advises a witness to plead the Fifth Amendment where the witness is justified in doing so become guilty of corruptly endeavoring to influence the witness merely because the interposition of the Constitutional privilege might also serve to protect the person giving the advice?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Constitution of the United States, Amendment V, provides, in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

18 U. S. C. 3481 provides:

> In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

18 U. S. C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each one shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U. S. C. 1503 provides in pertinent part:

> Whoever corruptly, * * * endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other commit-

ting magistrate, or any grand or petit juror, or officer in or of any court of the United States, * * * in the discharge of his duty, * * * or corruptly * * * influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U. S. C. 2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT

After a trial in the United States District Court for the Southern District of New York, all three petitioners were convicted on count 1 of an indictment, returned October 25, 1954, charging a conspiracy among themselves and with others "to defraud the United States in the exercise of its governmental functions of administering the internal revenue laws and of detecting and prosecuting violations of the internal revenue laws free from bribery, unlawful impairment, obstruction, improper influence, dishonesty, fraud and corruption, and in its right and interest in the conscientious, honest and faithful services, judgments, determinations, and actions of the defendants" who were employees of the Bureau of Internal Revenue, and to conceal the acts of the con-

spirators (R. 4–9).[2] Each was sentenced to five years' imprisonment and fined on this count (R. 2–4; 782–783). Petitioner Halperin alone was convicted on counts 5, 6 and 7, which charged a corrupt endeavor to influence particular witnesses (Marks, Berman, and Tobias) before the grand jury in the Eastern District of New York to give false testimony and to withhold information concerning certain of the transactions involved in count 1, in violation of 18 U. S. C. 1503 and 1505 (R. 14–16).[3] He was sentenced to two years' imprisonment and $1,000 fine on each of these three counts, the prison sentences to run concurrently with the sentence on count 1 (R. 3–4). These judgments were affirmed on appeal (Vol. V, App. 358), Judge Frank dissenting (Vol. V, App. 316–357, 381–393).[4]

[2] With respect to the conspiracy to conceal, paragraph 7 of the indictment alleged (R. 6):

"It was a part of the conspiracy that the defendants and co-conspirators would make continuing efforts to avoid detection and prosecution by any governmental body, executive, legislative and judicial, of tax frauds perpetrated by the defendants and co-conspirators, through the use of any means whatsoever, including but not limited to, bribery, improper influence and corruption of government employees, the giving of false testimony, the influencing, intimidating and impeding of prospective witnesses to refrain from disclosing the true facts, obstruction of justice, and the presentation of false and fraudulent affidavits, statements and documents to the aforesaid Bureau."

See also paragraphs 13 and 14, *infra*, p. 52 (R. 7).

[3] These counts were dismissed as to the other petitioners at the close of the government's case (R. 569).

[4] Petitioner Bolich was also convicted on count 2 which charged him, along with Steinberg and Scherm, as employees of the Bureau of Internal Revenue, with conspiracy in violation of 26 U. S. C. 4047 (e) (4) (R. 9–12). He was sentenced to three years' imprisonment and a $5,000 fine on that count, the prison sentence to run concurrently with the five-year sentence on count 1 (R. 782–783). The Court of Appeals, holding that both counts related to the same conspiracy, set aside the separate fine on count 2 (Vol. V, App. 358).

In granting certiorari the Court specifically limited the issues which it agreed to consider. In view of these limitations we have restricted our statement of the facts to matters which are pertinent to the questions before the Court, together with such background material as is essential to give those facts meaning.

1. The evidence for the government may be summarized in general chronological order as follows:

In 1947, the Bureau of Internal Revenue was investigating the income tax returns of two New York firms, Pattullo Modes, Inc., a dress manufacturing concern, and the Gotham Beef Company, a meat supplier to ship chandlers (R. 286, 570, 574–576, 896–898). By May 8, 1947, the investigation of the Pattullo Modes income tax returns for the years 1942, 1943, 1944, 1945, and 1946, revealed that the corporation had failed to report over $300,000 of income on its returns (R. 576). This income was derived from off-the-record sales and "jacking up the travel and entertainment accounts" and putting the cash proceeds in a safe deposit box (R. 18–20, 21). On May 8, 1947, the revenue agent investigating the Pattullo case recommended that it be referred to the Intelligence Unit of the Bureau for criminal fraud investigation (R. 576). (The special agent in the Intelligence Unit (Clayton) who received the case from the revenue agent in early February, 1948 (R. 419), concluded by January 5, 1949, after some investigation, that "the case was well in line to go forward to prosecution" (R. 431).)

By April of 1948, the investigation of the Gotham Beef Company and Gotham Ship Purveyors, Inc., for the years 1943 and 1944 (R. 853) revealed that $280,-

000 in sales had not been reported on their returns (R. 897).[5] The Gotham Beef people claimed that this figure represented over-ceiling sales which were offset by over-ceiling purchases (R. 155). The investigation substantiated only $160,000 of unreported purchases by Gotham (R. 898). The documentary proof submitted by the taxpayer of cash premium payments was only 10 to 20 per cent of the amount claimed (R. 312, 853). In his final report in April, 1948, the special agent investigating the Gotham case recommended criminal prosecution of the corporation and the partners, Louis and Philip Berman (R. 286, 854, 898).

Through intermediaries, both the Pattullo Modes stockholders and the Gotham Beef people had been referred to the law firm of Schopick and Davis for assistance in their tax matters. The tax troubles of Pattullo Modes were mentioned by Max Steinberg, a group chief in the revenue agent's office, to Milton Hoffman,[6] during a golf game in May 1947 (R. 207). Hoffman, learning that neither Schopick nor Davis had a contact with Pattullo Modes, arranged through his brother-in-law, Herman Deutsch, to meet Smith,

[5] Louis M. Berman and his brother Philip operated the Gotham Beef Company as a partnership in 1942. In 1943, they incorporated their business under the name of Gotham Ship Purveyors, Inc. In 1944 the corporation ceased operating (R. 134).

[6] Milton Hoffman, who was neither a lawyer nor a certified public accountant (R. 200), went to work for the law firm of Sherman, Schopick and Davis in 1945 and was to receive 12½ per cent of OPA fees. In 1948 or 1949, after Sherman left, Hoffman and Davis agreed that each would receive 47½ per cent of Schopick and Davis law firm receipts and Schopick would get the remaining 5½ per cent (R. 257-258).

the accountant for Pattullo Modes, who came to the law office of Schopick and Davis (R. 22, 207). For this Deutsch was paid $500 (R. 96–97, 826–827). Hoffman assured Smith he could be of help to Pattullo Modes in their tax troubles (R. 208) and arranged a meeting between Smith and Steinberg which was held about June 5, 1947 (R. 209). Steinberg promised to do everything he could to help (R. 209). The following Monday, about June 9, 1947, Mrs. Segel and Marks, Pattullo Modes' officers and stockholders, came to the office of Schopick and Davis and gave them a check for $7,500 as a retainer (R. 23–24, 210, 784). After an audit of Pattullo Modes' books in September, 1947, Schopick and Davis retained the law firm of Schwaeber and Saver in October, 1947, to represent Pattullo Modes (R. 305–306). The Pattullo Modes case was transferred to the intelligence unit, then under the supervision of petitioner Bolich, a high official in the Bureau of Internal Revenue (R. 306), in February 1948 (R. 419).

In October, 1947, Davis and Hoffman discussed with Schwaeber and Saver the voluntary disclosure policy of the Treasury Department (R. 306–307). Following the discussion, Davis told Smith, the accountant for Pattullo Modes, that "if he could say that he told the revenue agent of any additional income, no matter how meager the information was, that would be a voluntary disclosure according to Schwaeber's ideas" (R. 307). Smith, realizing that such a statement would pit his word against the revenue agent's (Scherm) word, said he was prepared to do so (R. 307). Though Davis did not

believe that Smith had made a disclosure to Agent Scherm, he told Saver that this had been done. Saver arranged a meeting for Smith with Wheeler, the revenue agent in charge and supervisor of Scherm (R. 308). Wheeler refused to believe a voluntary disclosure had been made by Smith (R. 308) and wrote a letter, dated February 3, 1948, to Bolich, the official in charge of the intelligence unit, requesting assignment of a special agent to the Pattullo Modes case (R. 581). Agent Clayton was given the assignment (R. 582). See *supra*, p. 10.

In March 1948, when the Pattullo Modes case was in the office of the intelligence unit, Saver discussed voluntary disclosure with Bolich (R. 308). Bolich did not then believe that a voluntary disclosure had been made (R. 308–309). On learning of Bolich's disbelief, Davis discussed the case with petitioner Halperin, a lawyer who had space in the office of Davis and Schopick (R. 605–606), and "said to him that this was a case where we needed some real help" (R. 309). Halperin said, "he knew a man in Washington," whom he identified as petitioner Grunewald, "a man he had known for a great many years, who was extremely influential and knew a great many people in Washington, and that if anybody could help, he would be the man to help" (R. 309). When asked why he did not go to Washington to see Grunewald, Halperin said he was not sure that he was on the best of terms with Grunewald (R. 309). Halperin said that if Davis wanted to meet Grunewald, Moe Polakoff, a personal friend of Grunewald, would arrange a meeting (R. 309). When Davis told Polakoff of the Pat-

tullo Modes tax troubles, Polakoff said "he thought that there was a man in Washington that could help" and identified him as Grunewald (R. 309–310). In May 1948, Davis and Hoffman (Davis' business solicitor, see *supra*, p. 11, fn. 6) accompanied Polakoff to Washington where Polakoff left them for a while and they then saw Polakoff and Grunewald conversing together in the Washington Hotel (R. 310). On the return trip to New York City, Polakoff reported that Grunewald had said he would look into the Pattullo Modes matter and report (R. 310). Davis had no further contact with Polakoff concerning the case (R. 310–311).

At this stage in the Pattullo Modes matter, the Gotham Beef tax case came to Schopick and Davis through Leo Greenstein, an accountant who had audited the Pattullo Modes books (R. 311, 855). Berman, a partner in Gotham Beef (R. 134), retained Schopick and Davis to handle the tax case (R. 153).

Davis met Berman and Tobias (an accountant) in late May or early June of 1948 (R. 311) and learned the facts of the Gotham Beef tax case (R. 312). Davis reported to Hoffman, Schopick, and Halperin (R. 312) that they could "get into" the case if they were in a position to help (R. 313). While Davis was away on vacation in late June, 1948, he received a phone call from Hoffman and Halperin who said they had been to Washington and had met Grunewald who had agreed to look into the Gotham Beef case (R. 219, 313). Before meeting Tobias in July, 1948, Davis learned that Halperin, on his trip to Washington, had been "extremely well received by Mr. Grune-

wald and that Mr. Grunewald said he was surprised that Mr. Halperin had felt that he couldn't come to see him, and that by all means he would work with him and was glad to work with him" (R. 313–314). Halperin reported that Grunewald in Washington had telephoned someone and had said "This is Captain Henry; put a red flag, red stop, on the Gotham Beef case" (R. 892).

In early August, 1948, Davis and Halperin next met Berman and Tobias at lunch (R. 139). Davis explained that Halperin, an attorney who shared space in his office, had been brought into the case "because he had a very influential and wealthy associate in Washington" who "had connections with the Internal Revenue Department, and that he could handle this matter in a manner that would be satisfactory to us" (R. 139–140). Halperin assured the Gotham Beef people that "if this party took this case there would be nothing more happen on it; it would be ended" (R. 140). Davis or Halperin then asked for a "fee" of $100,000. Berman offered to pay only $25,000 (R. 140, 858–859). Halperin said that "this influential associate of his in Washington" who "could walk into a Senator's office, many, many Senators' offices without being announced" was not going "to use up one of his favors unless he was paid a good-sized fee" (R. 140). They refused to disclose the identity of the "Washington associate" to Berman (R. 859).

In late July, 1948 (R. 317), after Davis had been in the Gotham Beef case a short time, and while the "fee" negotiations were in progress (R. 141), Davis, at Halperin's suggestion, tried to contact Bolich rela-

five to the case (R. 316). Davis was twice in one day put off by Bolich's secretary (R. 316). Upon learning this, Halperin called Grunewald who said that Davis was to continue to call Bolich and that Bolich would speak to him (R. 316). When Davis again telephoned Bolich's office, he was put through by the latter's secretary and arranged an appointment for the next day (R. 317). At the meeting in Bolich's office the next day, Davis described the Gotham Beef case and was told by Bolich to submit the proof of off-setting over-ceiling cash purchases and net worth statements of the taxpayers (R. 317) to Kuehl, of the Review and Conference Staff of the Intelligence Division (R. 141, 275), who was then reviewing Special Agent Mullenbach's recommendation of criminal prosecution (R. 286).

On the day of his meeting with Davis, Bolich telephoned Kuehl, a subordinate with whom he had not communicated in three years, and informed him of Davis' visit and his contentions (R. 276–277, 896). Kuehl pointed out to Bolich that the files showed that Ronayne, not Davis, was attorney of record for the Gotham Beef Company (R. 277). Bolich said Davis would submit a power of attorney (R. 277). Davis filed a power of attorney about August 4, 1948 (R. 278–279).

At a conference held August 16, 1948, attended by Davis, Tobias, and Berman, for Gotham Beef, and Mullenbach and Kuehl, for the Bureau (R. 280), the Gotham Beef people submitted some substantiating records to support their claims (R. 281). Mullenbach

was instructed to work with Tobias and Davis and to prepare a supplemental report (R. 281).

Following this conference with Kuehl, Tobias and Berman again met with Davis and Halperin to discuss "fees" (R. 142). Davis then said he was able to get the "fee" cut to $75,000 and Berman then offered $40,000 (R. 141, 861). At this time, Davis mentioned that Halperin, through his Washington "associate," was able to reach Bolich when he himself could not (R. 141, 860). At the next meeting between Davis, Halperin, Tobias and Berman, Davis said he was able to get the "fee" cut to $65,000 because "they had another case pending which was greater in proportion and greater in amount than ours and they wanted to use our case as a guinea pig to see whether their associate in Washington could handle the matter satisfactorily" (R. 142, 862). Though Berman then offered to pay only $55,000, he later telephoned Davis and agreed to pay over $65,000 (R. 143), contingent on stopping the prosecution (R. 860).

Under the agreement as it was worked out, $60,000 in cash was to be placed in a safe deposit box in escrow to Halperin and Greenstein (the accountant), acting for the taxpayers, to be released at "such time as Mr. Tobias had gotten word from the proper authorities that the case had been—that the prosecution end of the case had been over with, * * *" (R. 144, 863). $5,000 was to be handed over to Schopick and Davis when "billed" (R. 143, 863–864). Berman brought $47,500 on September 15, 1948, and $12,500 ten days later to Davis (R. 145–147). The money was placed in a safe deposit box in the Trade Bank, for which

Halperin paid the $20 fee (R. 185), on September 15, 1948 (R. 147).

Halperin, though asked many times by Greenstein, refused to identify Grunewald as the Washington "associate" for whom he was acting (R. 882). Tobias learned directly from Kuehl that there would be no criminal prosecution (R. 167, 282). After telling Berman that a no-prosecution result had been achieved, Tobias authorized Greenstein to release the $60,000 he held in escrow to Halperin (R. 169, 867). A day or so later, Greenstein reported to Tobias that the money had been given to Halperin (R. 169). On October 29, 1948, Schopick and Davis "billed" Berman for $5,000 (R. 148). Davis gave Halperin $1,760, approximately one-third of the $5,000 received from Gotham Beef, for his activity in connection with the case (R. 905). Greenstein later received $370 from Schopick and Davis for his services in the case (R. 881).

Contemporaneously with their efforts in behalf of the Gotham Beef Company during 1948, Davis, Hoffman and Halperin were working on the Pattullo Modes case. In June 1948, Davis told Marks and Mrs. Segel of Pattullo Modes that he was dissatisfied with the progress Schwaeber and Saver were making (R. 26–27); that "he had a man in his office that could be of great help"—a Mr. Halperin. He said that Halperin (who had gone to Washington around this time with Hoffman to see Grunewald (R. 313)), had "a very good friend in Washington, an influential friend that he [Davis] would like him [Halperin] to talk to about our case" (R. 27). Davis did not

identify Halperin's Washington "friend" to Marks and Mrs. Segel (R. 27).

In early July 1948, Hoffman and Halperin again went to Washington to meet Grunewald to learn if he would handle the Pattullo Modes case (R. 219–220). While Hoffman waited in the living room of Grunewald's suite in the Washington Hotel, Halperin talked to Grunewald alone (R. 219–220). During the return trip to New York City, Halperin reported to Hoffman that "Mr. Grunewald said he would look into the Pattullo Modes case and see if he could be of any help" (R. 220). This was the second time Grunewald had agreed to do something about the case. *Supra*, p. 14. Upon Halperin's return from Washington, he went with Davis to meet Mrs. Segel and Marks and reported that he "spoke to his friend and that his friend thought he could help us and would start working on it" (R. 27–28). Davis gave Halperin $200 to cover his expenses on the Washington trip (R. 891, 904).

At about this same time, July 1948, Special Agent Clayton who had been assigned the Pattullo Modes case (*supra* pp. 10, 13) began a full field investigation (R. 420). As part of this investigation, Clayton proposed to circularize the customers of Pattullo Modes to ascertain the extent of business that they had transacted with Pattullo Modes (R. 420–421). Davis reported the possibility of circularization to Marks and Mrs. Segel who, saying they feared damage to their credit, asked Davis "to do everything he could to stop it" (R. 29, 315). Davis talked to Halperin who re-

marked that, "he wasn't sure he could do anything, but he would mention it to Mr. Grunewald" (R. 315–316). In early August 1948, Clayton went to Loehmann's store, a customer of Pattullo Modes, to review the records to learn what payments had been made to Pattullo Modes (R. 421–422). On the day of the visit, his group chief in the Bureau, Dowling, received a telephone call from Bolich who said, "Tell Special Agent Clayton to stay away from the banks and not visit any third parties in connection with his investigation" since it might jeopardize the credit of Pattullo Modes (R. 488, 932). A few days later, Clayton, at the request of Bolich, was asked for a status report showing the results of the investigation to date (R. 422, 488). The status report was dated August 6, 1948 (R. 489, 933). No circularization of Pattullo Modes' customers ever took place (R. 316). Davis told Marks (of Pattullo Modes) "that because of his good influence with the proper people he was able to get them not to circularize our [Pattullo Modes] accounts" (R. 29).

After the threat of circularization of Pattullo Modes accounts had been quieted, a series of conversations took place among the Pattullo Modes people and Davis, Halperin and Hoffman (R. 29). It was not until September 1948 that Davis reported to Mrs. Segel and Marks. "that Mr. Halperin's friend in Washington would be able to achieve the results that we wanted to settle our case satisfactorily for us, but it would cost us a great deal of money in cash" (R. 29). Davis mentioned $150,000 as the required amount and Marks offered to pay $50,000 (R. 29–30). Davis re-

jected the offer as "very, very silly" and said he would see what he could get Halperin and his "friend" to do (R. 30). Two weeks later, after Halperin had returned from Washington, Davis asked for $125,000 and Marks offered $70,000 (R. 30).

When Grunewald's demand stood at $125,000, Davis, Hoffman and Halperin went to Washington in late September or early October, 1948. Halperin alone went to Grunewald's office in the Munsey Building and later called Davis to join him. Before introducing Davis to Grunewald, Halperin told Davis that Grunewald had agreed to accept $100,000. After the introduction was made, Halperin repeated Grunewald's acceptance of the "case" for $100,000. When Davis thanked him, Grunewald said "O. K., O. K." (R. 327–328).

On his return from Washington, Davis told Marks and Mrs. Segel that they would accept $100,000, and that that was "their final word" (R. 30). When asked who was going to get the $100,000, Davis said that "the man in Washington would do it for $100,000" *i. e.*, "would settle our case satisfactorily to us" (R. 30–31, 828–830). The result the Pattullo Modes people were seeking for their $100,000 was "to settle this matter in a civil way without criminal prosecution" (R. 31). Davis told them that "nothing would be turned over until it was clear that there would be no prosecution" (R. 902). He also told them that the money must be in cash and he said further, "I don't want you to sell any securities. I don't want you to draw any money out of the bank in cash. There can be no record of this money" (R. 31, 902). The Pattullo Modes people

raised the money in cash, took it to Davis' office in late October, 1948 (R. 33, 831), gave it to Davis and Hoffman, and left (R. 31–32, 831, 902). Davis at that time said that the money would be turned over to Halperin to keep in New York until word was received from his "friend" in Washington that the desired result had been attained (R. 32, 920–921). The Pattullo Modes people, as of this time, did not yet know the identity of the Washington "friend" of Halperin (R. 32). Schopick and Davis never filed a power of attorney from Pattullo Modes (R. 914).

During October, 1948, the law firm of Schwaeber and Saver continued to press the Pattullo Modes case, unaware of the interest of Halperin and Grunewald in it. When Davis asked Halperin if the firm of Schwaeber and Saver should be continued in the case, Halperin replied that he had discussed the matter with Grunewald and that Grunewald "thought it would be better to leave them in the case so if by any chance a good result was achieved here that Schwaeber and Saver should not feel slighted and wonder why they couldn't get the same result" (R. 318). Schwaeber and Saver pursued the voluntary disclosure line of defense (R. 328). See *supra*, p. 13. When Baradel, Chief of the Conference Section of the Special Agents' Office, requested an affidavit from the accountant for Pattullo Modes, setting forth the facts of the alleged voluntary disclosure, Davis assisted Smith (the accountant) in the preparation of a false affidavit which Saver was to present to Baradel (R. 328). After hearing both Smith and revenue agent Scherm, Baradel ruled that there had been no voluntary disclosure

made in behalf of Pattullo Modes (R. 465, 472–473, 477, 940–941). Baradel testified that "* * * [Smith] had the worst memory I had ever come across in my long experience or that he was lying" (R. 473).

Though Special Agent Clayton had been informed by Bolich that the Pattullo Modes taxpayers had agreed to cooperate and make available the required records in August, 1948, at the time Bolich had instructed him to curtail his investigation (R. 423, 939), he was unable to secure this cooperation (R. 424, 426). On about November 19, 1948, Clayton, not knowing that any promise had been made to Pattullo Modes by any government official that they would not be prosecuted if they cooperated, went to Pattullo Modes office to begin his examination of the corporate and personal records (R. 426).

During the period that Clayton was trying to secure the cooperation of Pattullo Modes, Bolich had been promoted from his position as Special Agent in Charge of the Intelligence Division Office in New York and had gone to Washington, on about September 1, 1948, as Assistant Commissioner of Internal Revenue (R. 425, 498). It was during this period that Davis discussed Clayton's insistence on beginning the audit of Pattullo Modes' books with Halperin and pointed out that, since such an audit would amount "to a complete revelation of all of the taxpayers' tax evasions," they ought to know where they were going (R. 329). At Halperin's suggestion that Saver see Bolich, Saver went to Washington (R. 329). Saver reported back, in November, 1948, that "Mr. Bolich said to him that if the taxpayers cooperated fully and developed

all of their income that he would recommend that the case be given a no-prosecution consideration" (R. 329). At about the same time (the $100,000 having been delivered by the Pattullo Modes people two weeks before, *supra*, pp. 21–22), Marks and Mrs. Segel became nervous and inquired of Davis, Hoffman and Halperin when the desired result would be accomplished (R. 107). Halperin assured them "that all the arrangements had been made, that the no-prosecution deal would go through" but that they had to wait for the proper time to accomplish it (R. 107).

During the balance of November and through December, 1948, Pattullo Modes cooperated fully with Special Agent Clayton (R. 428–429). In November, Clayton told Revenue Agent Scherm who was assisting him "that there appeared to be some unusual maneuvering going on behind this case and that he should never forget it" (R. 428). On December 13, 1948, Scherm prepared and submitted to Clayton an affidavit in connection with the alleged voluntary disclosure. (R. 427). On January 4, 1949, Clayton received affidavits from Marks, Mrs. Segel and the other Pattullo Modes stockholders admitting their tax evasion (R. 429–430). The disclosure was complete except for the unrecorded sales which had been made to raise the $100,000 cash "fee" held by Halperin for Grunewald (R. 844–845). Clayton, at this time, not having been advised that any commitment not to prosecute had been made (R. 430), was of the opinion that the Pattullo Modes case was well in line to go forward to prosecution (R. 431).

On January 5, 1949, Internal Revenue official Baradel (*supra*, p. 22) received a telephone call from Bolich asking whether or not he had the Pattullo Modes case before him for review. On learning that Baradel had not seen the case since he had rejected the claim of voluntary disclosure and that it was still with Clayton, Bolich remarked that he had been visited by Saver and that he had "decided that if they [Pattullo Modes] give full cooperation to the agents, we ought to close that case non-prosecution." Baradel, as instructed by Bolich, told Clayton the same day (R. 464–465, 477, 941–945). Bolich said that he would take full responsibility for the "no-prosecution" decision and that it should so appear in the record (R. 474). At the time of Bolich's phone call to Baradel, there had been no official notification to Bolich that the Pattullo Modes taxpayers had signed the statements the day before, January 4, 1949 (R. 432). The only official information that Bolich had received about the Pattullo Modes case was contained in a sketchy status report submitted by Clayton on August 6, 1948 (R. 432). Baradel told Clayton to write his report on the Pattullo Modes case as he wished, but if Clayton recommended criminal prosecution, he, Baradel would be compelled to overrule him (R. 431, 433). Bolich's promise that there would not be a prosecution effectively destroyed the criminal case against Pattullo Modes (R. 484–485, 489).

On January 10, 1949, a conference was held in Baradel's office, attended by the Pattullo Modes four principal stockholders (Mrs. Segel, Marks, Cohen, and

Zipser), lawyers Davis and Saver, and Internal Revenue officials Scherm, Clayton, and Baradel, at which time Saver said that he had received a commitment of "no-prosecution" from Bolich on his visit to Washington (R. 433, 477, 483). Baradel, reminding the taxpayers that they had been guilty of a crime, advised them that because of consideration being given them outside of his own office they were not going to be prosecuted (R. 111, 433). Pattullo Modes paid to the law firm of Schwaeber and Saver, who thought they had obtained the decision not to prosecute, a fee of $15,000 (R. 818–819, 832). Davis had previously told the Pattullo Modes principals that he wanted Mr. Saver to continue to believe that he, Saver, had obtained the decision (R. 37). Pattullo Modes paid out $303,500 in connection with their tax case, which included the $100,000 for Grunewald and $107,500 to Schopick and Davis (R. 816–818).

On January 13, 1949, after the Pattullo Modes taxpayers had learned from Baradel of the decision not to prosecute, Halperin, Hoffman, Schopick and Davis removed from the safe deposit box the $100,000 in cash that had been delivered to them by the Pattullo Modes principals (R. 225–226). After counting the money and putting it in two brief cases, Hoffman and Halperin left for Washington by train, taking the money with them (R. 226–227). Grunewald met Hoffman and Halperin at the Union Station when their train arrived in Washington, and walked off with Halperin taking both brief cases with them (R. 227–228). The records of the Washington Hotel,

Washington, D. C., show that Halperin checked in at the hotel on January 13, 1949, and checked out after remaining a few hours (R. 503–504). The room rent for that date was charged to Grunewald (R. 948). Halperin later reported that he had delivered the money to Grunewald (R. 332–333). Davis gave Halperin $6,000 in two checks, one for $2,500 dated November 10, 1948, and the other for $3,500, dated January 24, 1949, for his "compensation", thus far, in the Pattullo Modes case (R. 903).

In 1948 and 1949, while an audit to determine the amount of the Pattullo tax liabilities and civil fraud penalties was being conducted, the Pattullo taxpayers were cognizant of the danger of the audit "* * * upsetting the applecart * * *" (R. 127–129). Marks testified that Davis told them, before the audit, "to keep our mouths shut about anything that had happened, not to talk to anybody, not to talk to even our accountant, Mr. Smith, about what had transpired and this money going to Washington" (R. 33). A sum of $25,000 to $40,000 was paid by Pattullo Modes in about March 1949, for the "boys in New York," ostensibly so that on a detailed examination of the civil tax liability no one would "* * * raise a fuss about the phony deal that had been put through" (R. 38, 128, 835). The civil tax audit and determination of tax liability for Pattullo Modes for the years 1942–1946 was completed late in 1950 (R. 459–461, 815). Throughout 1951, the Pattullo Modes people made unrecorded sales in order to cover the moneys they had expended (R. 119, 823, 837–838).

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In November 1949, ten months after the decision not to prosecute, Special Agent Clayton's report was sent to Bolich by Baradel (R. 467–468). The report stated that Bolich's commitment to the Pattullo Modes taxpayers was the only reason that prosecution was not recommended (Gov. Ex. 56). Bolich, on receiving the report, called Baradel at his home on a Sunday and asked him to write an explanatory memorandum to "* * * take a little heat off the situation" (R. 467–468).

In June, 1950, Hoffman, business solicitor for Schopick and Davis (*supra*, p. 11, fn. 6), learned from an acquaintance, one Greenberg, an accountant, that his accounting firm was handling the tax matter of Clover Foundation, a manufacturer of ladies undergarments owned by Mr. and Mrs. Glover, in which there was an indicated tax evasion of $750,000 to $1,000,000 (R. 339–342, 406–407). At a meeting with the Glovers, arranged by Greenberg for June 28, 1950, Davis and Halperin stated that "there was a person in Washington whom we had used in other cases, and that we would expect to go to him with this case" (R. 342). Schopick and Davis were given a check by the Glovers for $2,500 as a retainer fee (R. 345). Halperin, after talking with Davis, went to Washington "for the purpose of finding out whether or not Mr. Grunewald could handle the matter for us and how much he would want" (R. 346). Since Grunewald wanted $175,000 or $200,000 and the Glovers offered to pay over not more than $100,000, the retainer of $2,500 was returned to them (R. 346–347). Between the time of the Glover nego-

tiations and early June of 1951, Halperin made as many as ten trips to Washington to see Grunewald (R. 529).

Grunewald rented a suite of rooms in the Washington Hotel, Washington, D. C., between March 28, 1948, and August 25, 1951 (R. 499–500, 509). Between March 28 and August 13, 1948, Grunewald occupied suite 405, 406 and 407 under his own name (R. 499). Grunewald occupied suite 319, 320 and 321 from November 22, 1948, to October 23, 1949, and suite 419, 420 and 421 from October 24, 1949, to October 25, 1950, which were then registered in the name of Harry Woodring (R. 499–500, 526, 947–948). He continued to occupy suite 419, 420 and 421 from October 25, 1950, to August 25, 1951, in his own name (R. 509). Bolich, after coming to Washington, registered in the Washington Hotel and occupied Room 511 from September 7 through November 19, 1948, and Room 851 for three days from November 19 to November 22, 1948 (R. 509). Though Bolich lived in suite 319, 320 and 321—Grunewald's suite—from November 22, 1948, forward, he was not billed for the room rent (R. 516, 526–527), but only for such services as valet, meals, long distance and local phone calls (R. 510). Not only did Grunewald provide a hotel suite for Bolich (R. 537), but in the summer of 1948, while Bolich was still Special Agent in Charge of the Investigations Division in the New York Office, Grunewald gave a party for him in anticipation of his appointment as Assistant Commissioner of Internal Revenue (R. 513–514). At the same time Grunewald also main-

tained a residence in Washington (R. 529, 535) and offices in the Munsey Building (R. 512, 535).

Nancy Hain was employed as a secretary by Grunewald from June, 1949, to January, 1950, and from June 1950, to February, 1951, in his suites in the Washington Hotel (R. 525–526). Grunewald, though not an attorney nor an accountant (R. 530), said to her that "when people had tax problems, they bring them to him and that he would get them fixed" (R. 530). He repeated this statement on more than one occasion (R. 531). Grunewald told Pulley, who occasionally ran errands for him (R. 513), that "tax business was good business; he could take care of tax business to the advantage of the taxpayer, both as to time and to amounts" (R. 515). During the time Mrs. Hain was employed by Grunewald she made telephone calls to Bolich for him and when asked who was calling, she answered, on instruction from Grunewald, that "Captain Henry was calling" (R. 530). Bolich's secretary also testified that she had received telephone calls for Bolich from "Captain Henry" (R. 498, 947). Grunewald, when using the phone, often called himself "Captain Henry" (R. 514, 539, 959). He had a private telephone in his suite that did not go through the hotel switchboard (R. 959).

In February, 1951, the King Committee[7] of the House Committee on Ways and Means began its investigation of the Bureau of Internal Revenue (R.

[7] The Subcommittee has been popularly referred to as the "King Committee" with respect to its activities during the period January 13, 1951, until January 14, 1953, and as the "Kean Committee" with respect to its activities during the period January 15, 1953, until October 30, 1953 (R. 403, 931).

403, 931). In June or July of the same year, Halperin told Schopick and Davis that a Congressional investigation was afoot which could look into the Pattullo Modes case and that they had better get hold of their clients (R. 354, 355). Marks and Mrs. Segel were called in to Davis' office and, in the presence of Halperin, Davis and Schopick, were warned of the impending investigation and told "that they should under no circumstances speak to anybody that comes to them" (R. 354, 845).

On August 15, 1951, Shapiro, an agent of the subcommittee, came to see Mrs. Segel who told him that Pattullo Modes first learned of its tax difficulties from a revenue agent (R. 355–356). When Davis learned of this answer, which refuted the claim of a voluntary disclosure by Pattullo Modes, Davis reported the event to Halperin, Schopick and Hoffman (R. 355–356). Davis, Halperin, Schopick and Hoffman then agreed that Marks and Mrs. Segel should retain a lawyer (R. 356).

During August, 1951, the subcommittee asked Internal Revenue official Baradel for the Pattullo Modes file (R. 942). Baradel discussed the request of the subcommittee for the Pattullo Modes file with Bolich while the latter, who was still Assistant Commissioner, was in the New York office of the Bureau (R. 942–943). At about this time, Halperin, when asked if Grunewald could be of any help, stated that "he was sure that Mr. Grunewald knows about it," and that if he were in a position to help that he would (R. 363).

On August 16, 1951, the day following Shapiro's interview with Mrs. Segel, a subcommittee subpoena

was issued to Smith, the Pattullo Modes accountant, who had filed the false affidavit of voluntary disclosure (R. 92, 357). Davis advised Smith, who had retained counsel (R. 93), to stick to his affidavit and to claim the client-attorney privilege in regard to all his dealings with Davis (R. 93, 357). Smith did as Davis instructed (R. 94–95). Davis, too, when called before the subcommittee lied when he said he believed the Smith affidavit on voluntary disclosure (R. 358).

About August 20, 1951, the Pattullo Modes people retained a lawyer to represent them in connection with the King Committee (R. 40–41). Davis was present at the initial conference and said that he would do most of the talking (R. 41, 357). Nothing was told this attorney about the $100,000 (R. 41, 357).

Smith was arrested on August 30, 1951, on a charge of having filed a false affidavit (R. 42, 359). Thereafter, Halperin, Davis, Hoffman and Schopick met to decide on a course of action (R. 359). Davis told Marks and Mrs. Segel that "the arrest was a pressure move to get the rest of us to talk" (R. 359–360).

On December 11, 1951, the King Subcommittee subpoenaed the Washington Hotel records covering the period from June 22, 1949, to June 22, 1950 (R. 948–951). The hotel management, discovering that the subpoenaed bills had not been replaced in the files and could not be found, wrote a letter to Bolich asking him to return them (R. 951). These same files had been loaned to Bolich in the summer of 1950 (R. 949–950). On December 20, 1951, Bolich telephoned the hotel manager at his home and said that he had never received the records (R. 951–954). During the

period covered by the lost records, Bolich lived in the suites occupied by Grunewald and registered in the name of Harry Woodring (R. 954–955). On September 28, 1950, Bolich had hired Olsen, a carpenter, to cut out a section from the baseboard in a closet in his New York home to make a hiding place for secret Washington papers (R. 543–545).

In February, 1952, a grand jury was empanelled in the Eastern District of New York to investigate violations of the Internal Revenue laws and their administration and enforcement (R. 402–403, 931). Davis, Halperin, Hoffman and Schopick, on learning of the pending grand jury investigation, discussed it among themselves and concluded that the grand jury would not be in a position to find any indictments because there was no act committed in the Eastern District (R. 360–361). They were all of the opinion that the clients would plead their constitutional privilege before the grand jury (R. 361).

Revenue agents sent to examine the books of Schopick and Davis asked for an explanation of the $500 check drawn by Smith to Deutsch, *supra*, p. 12 (R. 361, 826–827). Schopick explained that the check was a loan from Hoffman to his brother-in-law Deutsch (R. 361), when in fact it was actually given to Deutsch for his aid in bringing Pattullo Modes to Schopick and Davis (R. 22, 97, 207, 361). Hoffman instructed Deutsch not to say anything before the grand jury (R. 813–814). When Smith was subpoenaed before the grand jury, Schopick told him to say that the $500 check was given Deutsch as an indirect loan from Hoffman (R. 96–97, 361).

During the next few months, following the empanelling of the grand jury, Deutsch, Hoffman, Halperin, Schopick, Davis, the Pattullo Modes stockholders, the Gotham Beef taxpayers and Grunewald's secretary, Nancy Hain, were subpoenaed as witnesses (R. 44, 150, 363, 531). Davis, Hoffman, Halperin and Schopick met in March, 1952, and, though they felt that the Pattullo Modes people "were going their own way," it was agreed that Davis "should nevertheless try to communicate with Mr. Marks" (R. 362). Davis saw Marks and, after imploring Marks not to talk, said that he "* * * would be crazy to talk * * *" and asked "Morton, are you going to turn me in?" (R. 45, 362). Davis also saw Mrs. Segel and urged her to lie before the grand jury about what had transpired in the Pattullo Modes case (R. 116–118). Marks and Mrs. Segel, however, decided to tell their story to the grand jury (R. 45, 125).

In early 1952, Halperin and Davis told Tobias of the Gotham Beef Company that no one had talked about the Gotham case and that if everyone was quiet the investigation would blow over (R. 170). In February, 1952, they again visited Tobias and told him that he, Tobias, and Berman (of Gotham Beef) should remain silent; that Halperin had done Berman a good turn and Berman should not hurt him by talking (R. 171, 870). The Pattullo Modes people had testified before the grand jury before Halperin again saw Tobias (R. 171). When Halperin did meet Tobias, he sought to persuade Tobias and Berman to remain silent, stating that the "Washington associate"

was going to "stand silent"; that he, Halperin, would be silent; and it would be a terrible thing for him if they testified (R. 171–172). When Tobias asked Davis if Grunewald was the man who was involved, Davis said, "It is none of your business" (R. 171, 871).

On May 13, 1952, Nancy Hain, Grunewald's personal secretary, was subpoenaed to appear before the grand jury (R. 531). She knew that Halperin had visited Grunewald often; that Bolich had lived in Grunewald's suite at the Washington Hotel for a time; that Grunewald used the name "Captain Henry"; and that Grunewald had said that people with tax problems would bring them to him and that he would get them fixed (R. 525–531). Immediately after she was subpoenaed, Grunewald phoned and offered to furnish her money for a trip to New York telling her that she "* * * didn't need to discuss it, and * * * [she] could just say [she] didn't remember" (R. 531–533). Grunewald's messenger arrived that night with the money for her (R. 533). Mrs. Hain falsely stated, in response to some question put to her by the United States Attorney, that she did not remember (R. 534). She returned the money to Grunewald by registered mail (R. 533).

2. In submitting the conspiracy count to the jury, the trial court (District Judge Dawson) pointed out that the indictment charged that the conspiracy comprehended within it a conspiracy to conceal the true facts from investigation (see *supra,* p. 9, fn. 2), should investigation thereafter eventuate, and that this was an important element in view of the three-

year statute of limitations (R. 732). He charged (R. 733–735):

> To determine whether certain of the alleged overt acts were in furtherance of the object of the conspiracy, you have to determine the duration of the conspiracy. Did it end when the Pattullo Modes people and the Gotham Beef people received an assurance of no prosecution from the Bureau of Internal Revenue, or was a part of the conspiracy a continuing agreement to conceal the acts done pursuant thereto? In determining whether a part of the conspiracy was an agreement to continue to conceal the illegal acts after their consummation, you may not imply that such an agreement was part of the conspiracy. You would have to find from the evidence of the acts and declarations of the co-conspirators that there was an understanding or agreement to conceal the conspiracy. *If you find that such an agreement or understanding to conceal the conspiracy was not a part of the conspiracy to defraud the government, but no more than an afterthought brought to the surface when the co-conspirators were confronted with the Grand Jury and King Committee investigations, then you must find, as a matter of law, that the defendants are not guilty of the crime charged in the first count of the indictment.* If you find that the evidence shows, beyond a reasonable doubt, that as a part of a conspiracy to defraud the government, there was an agreement or understanding to conceal the illegal acts and that this too was an objective or part of the conspiracy, then you may find that such understanding was a part

of the conspiracy. *However, you must additionally determine whether this objective of the conspiracy was known to the defendants.* If this objective was known originally by only part of the conspirators but thereafter during the existence of the conspiracy, the scope of the conspiracy was extended so as to include such an agreement to conceal, and if you find that some of the defendants did not know of the expansion to include the agreement to conceal, you may not impute to them the knowledge of their co-conspirators and they could not be found guilty of the crime charged in Count One.

Now, therefore, as to the defendants Halperin, Grunewald, and Bolich, you have the questions of fact, first, as to whether they became parties to a conspiracy to defraud the United States, and that part of this conspiracy was to make continuing efforts to avoid detection and prosecution by any governmental body; second, whether they knew the general objectives of the conspiracy; and third, whether any one of the conspirators took any overt act within three years prior to October 25, 1954, to accomplish the result of that conspiracy. If you can answer these questions all in the affirmative, beyond a reasonable doubt, then you would be justified in returning a verdict of guilty on the first count of the indictment as against each one of these three defendants. If you cannot find that you can answer these questions in the affirmative, beyond a reasonable doubt, as to these three defendants, then as to the ones concerning whom you cannot so answer it, you should return a verdict of not guilty. [Emphasis added.]

SUMMARY OF ARGUMENT

The sufficiency of the evidence to support the verdict that petitioners engaged in a tax-fixing conspiracy is not before this Court. We shall therefore assume what the court below found, namely that the evidence fully proved the existence of a tax-fixing ring involving a high official in the Bureau of Internal Revenue (Bolich) and the two other petitioners.

I.

The statement of the questions presented, as it appears in the Court's order granting certiorari (*supra*, pp. 2–6), is derived from the petitions for certiorari. As phrased, the questions contain significant assumptions which pose issues not raised on this record. For example, in the questions dealing with the statute of limitations there is the important assumption that the original conspiracy terminated prior to the overt acts of concealment on which the Government relies to bring the conspiracy within the three year term of the statute. On the basis of that assumption, the decision of this Court in *Krulewitch* v. *United States*, 336 U. S. 440, would be controlling and the action would be barred. However, the real issue posed by the case is whether the jury, under its instructions, could properly have found that the conspiracy was a continuing one which included an initial agreement to conceal and that the overt acts of concealment within the period of the statute were in furtherance of that conspiracy.

The record clearly supports the charge in the indictment that a tax-fixing apparatus was established to service distressed taxpayers whenever they could be

induced to pay the asking price. Instead of separate arrangements to process the problems of Pattullo Modes and the Gotham Beef Company and Clover Foundation, the conspirators were prepared to apply their peculiar talents to these or other cases as the occasion permitted or invited. This is a far different situation from that presented in *Kotteakos* v. *United States,* 328 U. S. 750, where the government attempted to treat as a single conspiracy the various activities of separate persons who stood in the place, not of the fixers, but of the taxpayers here. It is far closer factually to *Blumenthal* v. *United States,* 332 U. S. 539, where an entire ring was included even though different members performed specialized activities in aid of the single conspiracy.

Also, it was clear from the start that all parties were in agreement that secrecy was essential to the successful operation of the project. Not only the details of the process, but also the names of the participants, were concealed from the taxpayers by mutual agreement. Thus, the overt acts of concealment were not an afterthought or the acts of individuals saving themselves, but a real part of the original plan. The dissenting judge's argument that such an agreement may not be implied from actions, particularly in its application to acts during the period when the conspiracy was active in all its aims, finds no support in the cases. The details of conspiracies must frequently be established by circumstantial evidence. Neither *Krulewitch* v. *United States,* 336 U. S. 440, nor *Lutwak* v. *United States,* 344 U. S. 604, relied on by the petitioners, holds to the contrary; both recog-

nize that in some conspiracies the element of concealment is a part of the agreement. In every case it must be a question of fact for the jury to decide on proper instructions. Here, the jury was correctly instructed that in order to convict it must find that there was agreement to conceal, and that it must make that finding on the basis of evidence, not by implication from the conspiracy to perform the illegal acts. And there was ample evidence to support the jury's verdict on that issue.

The conspiracy from the start had three main objectives: first, to obtain decisions from the Bureau of Internal Revenue not to institute criminal prosecutions; second, to protect those decisions by concealing the manner in which they were obtained; and, third, to protect the conspirators by hiding both its processes and its membership. The statute of limitations was three years, and overt acts would have to be proved subsequent to October 25, 1951, to prevent the action from being barred when the indictment was brought on October 25, 1954. Since the congressional investigation of the Bureau of Internal Revenue commenced before the 1951 date, the opportunity of obtaining *new* business was somewhat reduced. But the need to protect the results of *past* activities, *i. e.* to hold the line against criminal prosecution of Patullo Modes and Gotham Beef, still continued, as did the need to protect the conspirators themselves from disclosure or prosecution. Overt acts, after October 25, 1951, to accomplish these ends were fully proved. Since they were in pursuance of the original conspiracy, they

prevented the statute of limitations from barring this proceeding.

II.

In various forms, the petitioners claim that the trial court erred in permitting the government to cross-examine the petitioner Halperin, who was the only defendant to take the stand, with respect to his prior claim of self-incrimination before a grand jury in connection with the same questions which he answered at the trial. The trial court instructed the jury that this evidence could be considered only with respect to the credibility of Halperin's testimony and that it was not permissible to draw any inference of guilt from the claim of privilege.

Petitioners recognize that a similar problem was before this Court in *Raffel* v. *United States,* 271 U. S. 494, where the decision was in favor of the admissibility of the evidence for the limited purpose of testing credibility. Petitioners argue, however, that *Raffel* was wrongly decided, that it is inapplicable here since the present claim was made in a grand jury proceeding, and that later decisions of this Court show a withdrawal from the *Raffel* ruling.

As to *Raffel's* being wrong, we submit that it is entirely consistent with the general rule that, when a defendant takes the stand, he subjects his testimony to the usual tests of cross-examination and rebuttal and his own credibility to the judgment of the jury. A prior refusal to answer questions which a defendant now answers on trial presents an inconsistency which a jury is entitled to consider. The witness may ex-

plain the difference in his position, but the sufficiency of the explanation is strictly a jury question.

The *Raffel* decision has been frequently followed where the prior claim was asserted before a grand jury. The only real relevance of the nature of the proceeding in which the claim is asserted is that, where the circumstances of testifying are different, the difference in position is more easily explained. But the difference in circumstances between a grand jury and a petit jury is not so great as to eliminate the inconsistency. Therefore, the evidence of a prior claim of privilege is still relevant and the clear holding of the *Raffel* case is that the waiver when a defendant takes the stand is complete for all purposes.

As for this Court's asserted withdrawal from the position it took in *Raffel,* in none of the many cases in which the Court has expressed its ungrudging support of the constitutional privilege against self-incrimination has it withdrawn at all from the view that the privilege may be waived. Cf. *Rogers* v. *United States,* 340 U. S. 367. Both *Johnson* v. *United States,* 318 U. S. 189, and *Slochower* v. *Board of Higher Education,* 350 U. S. 551, forbid the use of the claim of privilege as a basis for implying guilt. Cf. *Ullmann* v. *United States,* 350 U. S. 422. No such implication is here involved.

Finally, petitioners complain of the form of the trial judge's instructions to the jury, warning them against the implication of guilt. The instruction proposed by petitioners is probably correct, but it was neither as complete nor as specific as the phraseology employed by the court. Obviously, there is no

obligation on a trial court to adopt the wording suggested by a defendant so long as the court's own instructions are correct.

III

The third issue is whether it infringed upon petitioner Halperin's constitutional rights to subpoena him to testify before the grand jury in Brooklyn in view of the fact that prior witnesses had already implicated him in the conspiracy. The petitioner states the issue in terms of his being a "*de facto* defendant" subjected to "unsanctioned examination before trial."

Actually, the Brooklyn grand jury was involved in a general broad-scale investigation of fraud in the Bureau of Internal Revenue. Even if Halperin was implicated, there can be no doubt that the primary object of the investigation was to uncover the facts about the Bureau and the official personnel involved, concerning which Halperin might be in a position to furnish information. As to the particular conspiracy here involved, the Brooklyn grand jury had no jurisdiction to indict; the indictment was eventually brought in the Southern District of New York. And it is far from clear that the jury had sufficient information to reach even a tentative conclusion that Halperin was guilty of a federal crime.

On this type of record there is no basis for resolving the issue of whether a "*de facto* defendant" may be called before a grand jury, a proposition as to which there is a sharp split of authority. Even those jurisdictions which hold that a "*de facto* defendant" may not be called as a witness before a grand jury

do not extend that theory to persons who are merely generally involved and whose testimony is essential to complete the investigation. To limit the powers of the grand jury in such a case as this would immeasurably hinder the performance of its true function to investigate and then accuse, but not to try cases. It would force investigative work into the hands of other agencies where the rights of the accused have fewer safeguards. Thus, both the interests of law enforcement and of persons under suspicion are best preserved by maintaining the historic freedom of the grand jury to investigate where it will.

IV

Petitioner Halperin's argument, that the alleged obstruction of justice, covered by Counts 5, 6 and 7, of which he alone was found guilty, consisted merely of advising witnesses to plead the protection of the Fifth Amendment in order to protect themselves, is patently without foundation. The record made it clear that Halperin was not consulted by the witnesses as their lawyer, but that he and his associates went to them pleading that they should not make disclosures to the grand jury. Halperin was trying to save his own skin, not theirs. The trial court correctly instructed the jury that to convict it must find more than advice on constitutional rights, it must find a deliberate intent to impede judicial proceedings. The evidence amply supported the jury in so finding.

ARGUMENT

The essential issue which was submitted to the jury, whether or not these petitioners were involved in a

tax-fixing conspiracy, is not before this Court under the limitations written into the grant of the writs of certiorari. This makes it superfluous to recite the evidentiary details supporting the government's charge that one of the petitioners, a very high official in the Bureau of Internal Revenue, was guilty of betraying his trust and that the other two were guilty of subverting him in a vital field of government. The court below found (Vol. V, App. 291):

> The proof of the existence of a single, overall conspiracy is simply overwhelming. The complicity of Halperin, as well as Davis, Hoffman and others, is established beyond peradventure of a doubt. The evidence is no less convincing against Grunewald and Bolich, and the jury were warranted in drawing the conclusion that all the circumstances taken together established beyond reasonable doubt that Grunewald and Bolich were not only members of the conspiracy, but that they were "the fixers."

It is in the context of this proved conspiracy that we discuss the issues which the Court has indicated it will consider.

I

THE INDICTMENT CHARGED, AND THE EVIDENCE SUPPORTED THE JURY IN FINDING, THAT THERE WAS ONE GENERAL CONSPIRACY WHICH FROM ITS INCEPTION CONTEMPLATED ACTS OF CONCEALMENT AND THAT THERE WERE OVERT ACTS OF CONCEALMENT IN FURTHERANCE OF THAT CONSPIRACY WITHIN THE PERIOD OF LIMITATIONS

Nine[8] of the nineteen questions enumerated in the order of this Court granting the petitions for writs

[8] Case No. 183, Questions 1, 2, 3, 4 and 5; Case No. 184, Questions 8 and 9; Case No. 186, Questions Nos. 1 and 2.

of certiorari (*supra*, pp. 2–6) concern the scope of the conspiracy charged against petitioners in the indictment and proved on the trial. The phrasing (which is the same as appears in the petitions for the writs of certiorari) in many instances, particularly in No. 183 (*supra*, p. 2), assumes as established what is really the matter at issue, *i. e.* that the original conspiracy had been terminated before the overt acts of concealment occurred,[9] and that the acts of concealment were at most pursuant to an independent, separate, later conspiracy.

As phrased by the government in its brief in opposition, the question is:

> Whether the jury could properly find that a conspiracy to defraud the United States in the operation of the internal revenue laws was in existence during the applicable three-year statute of limitations under instructions authorizing them to convict only if they found that agreement to conceal the initial fraud was part of the continuing agreement to conceal the acts done, that such an agreement was known to each of the participants, and that it was established by evidence other than implication from the crime itself.

However phrased, the prime issue which the Court has agreed to consider concerning this conspiracy is whether or not prosecution was barred by the statute of limitations.[10] Admittedly, the only overt acts al-

[9] On that basis, there would be no dispute that the acts of concealment would not have been in furtherance of the conspiracy. *Krulewitch* v. *United States*, 336 U. S. 440.

[10] 18 U. S. C. 3282, as enacted by the Act of June 25, 1948, c. 645, 62 Stat. 828, was considered by all parties at the trial as

leged and proved to have been committed within the three-year period next preceding the return of the indictment on October 25, 1954 (*i. e.*, October 25, 1951–October 25, 1954), were acts of concealment.[11] Petitioners argue that these overt acts of concealment are not sufficient to toll the running of the statute of limitation; that the actual conspiracy had ended more than three years before October 25, 1954; and that their acts of concealment were either independent acts of the individual petitioners, done to conceal their own wrongdoing, or the consequences of a new and separate conspiracy entered into subsequent to the completion of the original conspiracy. It becomes necessary therefore to determine what was the scope and extent of the conspiracy charged and proved. This in turn raises the questions: (1) whether the evidence proved one general continuing conspiracy, or multiple separate conspiracies; (2) whether that conspiracy did embrace, as an integral part, an agreement to conceal the conspiracy, the conspirators, and the acts done pursuant to the conspiracy; (3) whether, as a matter of law, a conspiracy to defraud can ever include a conspiracy to conceal; and (4) finally—the

applicable. This section provided that prosecution must be instituted within three years next after the offense. By the Act of September 1, 1954, c. 1214, § 10 (a), 68 Stat. 1145, 18 U. S. C. 3282 was amended to provide a five-year period of limitations.

[11] Since the statute extending the period of limitations to five years was by its terms made applicable to offenses not barred on its effective date, namely September 1, 1954 (18 U. S. C. (Supp. III) 3282), the crucial date for overt acts to bring the conspiracy within the period of the statute was September 1, 1951, rather than October 25, 1951. However, the court instructed the jury on the basis of the later date and the error was of course in favor of the petitioners.

heart of this case—whether the overt acts of concealment, as distinct from the overt acts of fraud, were in furtherance of that single continuing conspiracy.

A. THE RECORD REVEALS THAT THERE WAS ONE BROAD, GENERAL, CONTINUING CONSPIRACY TO DEFRAUD THE UNITED STATES WHICH INCLUDED, FROM THE BEGINNING, A KNOWN UNDERSTANDING TO CONCEAL THE CONSPIRACY, THE CONSPIRATORS, AND THE ACTS DONE PURSUANT TO THE CONSPIRACY

Petitioners argue that the activities with respect to each taxpayer were separate and distinct, and that the acts of concealment were, if not merely individual acts to save themselves, at most independent of all activities in relation to the taxpayers. The indictment charged, and the verdict (in the light of the judge's charge) found, that the activities described in the Statement, *supra,* were pursuant to one general scheme. The evidence fully supports that basic conclusion.

1. The actions with relation to the individual taxpayers were not separate and distinct, but were part of the activities of one, general, tax-fixing ring. The conspiracy was designed to link taxpayers in difficulties to Bolich, who as a high Internal Revenue official had power to get them out of trouble. The ring consisted of men (Hoffman, Greenstein) to seek out taxpayers in trouble and bring them to Schopick and Davis, ostensibly as lawyers. Schopick and Davis, in turn, used Halperin, their close associate, to make the contact with Grunewald and he, in turn, was the link to Bolich. This general machinery was established and ready to operate whenever there could be found a taxpayer willing to pay enough for the "services."

From the viewpoint of these petitioners (Bolich, Grunewald and Halperin), all of whom operated with a view to fixing tax cases, the individual taxpayers were merely the "customers" to whom "services" were sold pursuant to the general conspiratorial arrangement.

The interrelationship of the individual taxpayers' cases to the general conspiracy in which petitioners were engaged is well illustrated by the fact that, when the Gotham Beef and Pattullo Modes cases were being handled at overlapping times, the conspirators lowered the price to Gotham Beef because they wanted to be in a firm position to assert that they could actually deliver what they promised in the bigger case of Pattullo Modes (see the Statement, *supra,* p. 17). Having succeeded with Gotham Beef, they felt that they could charge a higher price as to Pattullo Modes. And then, secure in the knowledge that the conspiracy was working, they tried to charge the Clover Company more than it was willing to pay (*supra,* p. 28).

On these facts, it is clear that the case of *Kotteakos* v. *United States,* 328 U. S. 750, on which petitioners rely, is wholly inapposite. There the central figure, through whom fraudulent applications for housing loans were processed, had pleaded guilty and was not before the Court. The indictment sought to link in one conspiracy thirty-two defendants who merely used the same intermediary, each solely for his own purpose. The government in its brief conceded that the persons who used the services of the intermediary, without knowledge of each other, and without knowledge that there was any central scheme in operation,

could not be said to have been joined in one conspiracy. But even on that set of facts, there can be no doubt that, if the central figure had not been an individual, but a group operating together, who processed all the fraudulent applications they could get, the central group itself would have been engaged in one conspiracy. See *Canella* v. *United States,* 157 F. 2d 470, 478–479 (C. A. 9), where the Court of Appeals held that the central figure engaged in various frauds was properly convicted on a charge of a single conspiracy even though the fraudulent activities were so different that participants in particular aspects thereof should not all have been joined with the center. In *Blumenthal* v. *United States,* 332 U. S. 539, involving a conspiracy to sell liquor at over the ceiling prices, the five defendants fell into two groups—two who were the putative owners of whiskey and three who acted as salesmen without knowledge of each other. The Court had no problem as to the implication of the putative owners, the central figures, in the whole conspiracy (see 332 U. S. at p. 553). It held that even the salesmen, who were not shown to have known each other or the exact limits of the plan, were nevertheless part of single conspiracy, joined in the attainment of a common goal (332 U. S. at pp. 556–559). *A fortiori* here, where all the petitioners were part of the central tax-fixing ring, aware of each other's position, it is clear that there was one general conspiracy to defraud the United States in the operation of the internal revenue laws as to any tax cases in which a large enough bribe or influence-payment could be obtained.

It is also clear that this conspiracy continued well beyond January 4, 1949, when the decision not to prosecute was reached in the Pattullo Modes case. It was still set up and ready for action in June, 1950, when the effort was made to get a huge price from the Clover Foundation. It may not have been active at all times because clients of the desired magnitude were not easy to obtain, but the relationship among the conspirators, their mutual understanding, was a continuing one. The terminal date of the conspiracy is a matter we discuss, *infra*, pp. 60–65. The point we make here is that the conspiracy, in its inception, contemplated a continuing undertaking.

2. From the very nature of the conspiracy as a scheme to set up a tax-fixing business, there had to be, and was, from the outset a conscious, deliberate, agreement to conceal, not only the particular actions with respect to individual taxpayers, but each and every aspect of the conspiracy, from the interest of the "chaser" to the identity of Grunewald and Bolich, the top figures. Such concealment would manifestly serve two objects: (1) it would enable the ring to stay in business so that they could get other cases; and (2) it would preserve the fruits of what had already been accomplished—the decision not to prosecute on behalf of the taxpayers who had already utilized the "services" of the ring. The two objectives were of course interrelated. Discovery of the fraud by which a single decision not to prosecute was obtained would jeopardize the success of the entire conspiracy. Discovery of the over-all conspiracy would cast doubt upon the validity of all decisions

not to prosecute entered in all cases which had been handled by the conspiracy. Concealment of all phases of the operation was absolutely essential. The indictment charged that concealment was specifically a part of the conspiracy,[12] and the evidence proved it, not only in the later stages of the illicit relationship, but from its very inception.

The record is replete with specific evidence that *from the beginning* the conspiracy, as conceived and put into operation by the conspirators, included as an integral part an agreement to conceal the conspirators and their conspiracy. The conspirators, in all their contacts with their tax evading clients, Pattullo Modes, Gotham Beef Company and the Clover Foundation, carefully withheld the identity of their contact man in the capital. They invariably referred to him as the "Washington associate" or the "man in Washington." Even when forthrightly asked by repre-

[12] Count 1 of the indictment alleged (R. 6-7):

"7. It was a part of the conspiracy that the defendants and co-conspirators would make continuing efforts to avoid detection and prosecution by any governmental body, executive, legislative and judicial, of tax frauds perpetrated by the defendants and co-conspirators, through the use of any means whatsoever, including but not limited to, * * *.

* * * * *

"13. It was further a part of the conspiracy that the defendants and co-conspirators at all times would misrepresent, conceal and hide and cause to be misrepresented, concealed and hidden, the acts done pursuant to and the purposes of said conspiracy.

"14. It was further a part of the conspiracy that the defendants and co-conspirators would misrepresent, and conceal and cause to be misrepresented and concealed the acts done pursuant to the conspiracy and the true nature of the conspiracy by any means whatsoever, * * *."

sentatives of the clients if the man in Washington was Grunewald, the conspirators insisted that it was none of the client's business (*supra,* p. 35). The identity of Bolich was even more carefully concealed.

The record also established that the conspirators were aware from the beginning of the need to cover up in order to prevent upsetting the no-prosecution decisions. Particularly in relation to Pattullo Modes, the evidence is unmistakable that there was a general understanding of the danger of "upsetting the apple-cart" (R. 127–129). Pattullo Modes was instructed not to sell its assets nor make withdrawals from its accounts to raise the $100,000 bribe, lest the money be traceable. The retainer of the firm of Schwaeber and Saver was continued at Grunewald's direction to cover the activities of the conspirators. When the decision not to prosecute was rendered in behalf of Pattullo Modes, Grunewald instructed the taxpayers to let Schwaeber and Saver think they had accomplished the result even though the taxpayers knew they had actually done nothing to achieve that end. After the decision not to prosecute, money was collected to be given to the men in New York who were to determine the civil liability, in order to forestall disclosure (R. 38, 128, 835). Even the accountant, Smith, who had made a false affidavit on behalf of Pattullo Modes, was not to be told about what had occurred in Washington (R. 33). And as late as August, 1951, after the representative of the King Committee had called at Pattullo Modes, the taxpayers and Davis showed their understanding of the continuing need for concealment by failing to disclose,

to the new attorney they had retained, the facts as to the $100,000 bribe (R. 41, 357).

The evidence thus amply established as a matter of fact, what the indictment charged, that there existed a single conspiracy to defraud the United States in the operation of the Internal Revenue laws, both in the "fixing" of the tax cases and in the continuous concealment of the conspiracy, the identity of the conspirators, and the acts done pursuant to the conspiracy.

B. AS A MATTER OF LAW, A CONSPIRACY TO DEFRAUD CAN INCLUDE, AS AN INTEGRAL PART, A CONSPIRACY TO CONCEAL

It hardly needs elaboration that a conspiracy can in fact embrace a specific agreement to conceal the conspiracy, and that in such a case overt acts of concealment are in furtherance of the conspiracy. For example, in a conspiracy to commit espionage, it would hardly be unusual for the spies to agree to conceal their acquaintance with their co-conspirators as a part of, and in furtherance of, the conspiracy. In the crime of kidnapping, the acts of conspirators in hiding while waiting for ransom would clearly be planned acts of concealment which would be in aid of the conspiracy to kidnap. So here, there can be no doubt that, so long as the ring was set up and ready to operate, all acts of concealment, whether to hide the identity of the conspirators or the action theretofore taken, were unquestionably in furtherance of the initial conspiracy as planned by the conspirators. The agreement to cover up acts of wrongdoing by an official of the government is itself a conspiracy to impair honest administration, and thus a conspiracy to defraud. *Haas* v. *Henkel,* 216 U. S. 477. Had petitioners agreed only

to cover up acts in which they had no part, they would have been parties to a conspiracy to defraud the United States in the operation of the Internal Revenue laws. They were no less parties to such a conspiracy because they planned to defraud the United States both by perpetrating the initial act of serious wrongdoing, and by planning to keep those acts from being discovered.

Nothing in the decisions of this Court in *Krulewitch* v. *United States,* 336 U. S. 440, and *Lutwak* v. *United States,* 344 U. S. 604, relied upon in the dissent below [13] and by petitioners here, justifies the assumption, which would be contrary to all reason, that *no* conspiracy charge can ever embrace an agreement to conceal the conspiracy, no matter when the acts of concealment occurred and no matter what the evidence of such an actual agreement to conceal. On the contrary, both opinions recognize that agreements to conceal can

[13] The dissenting judge in the court below drew a general distinction between agreements to conceal, based in this type of case on whether the object of concealment was to give continuing protection against criminal prosecution to taxpayers, or to protect the conspirators from discovery. If the former, he appears to agree that overt acts occurring after the original decisions not to prosecute can support a jury finding of a continuing conspiracy. However, if the concealment was intended to protect the conspirators only, then he argues that the existence of the agreement may not be proved by overt acts of concealment. We take issue with this position if the opinion means, as it seems to, that the agreement to conceal cannot be proved by consensual overt acts of concealment pursued from the very commencement of the conspiracy. If that is what the dissenting judge meant, it is equivalent to saying that an agreement to conceal may never be founded on circumstantial evidence, however convincing. Certainly, the cases cited do not support such a conclusion.

factually be parts of conspiracies to commit other crimes.

In *Krulewitch* v. *United States,* 336 U. S. 440, the Court was concerned with a problem of admitting hearsay evidence on the trial of the defendants. Krulewitch and a woman associate had been charged with conspiring to violate the White Slave Traffic Act (18 U. S. C. 2421, 2422) in that they had agreed to persuade and induce another woman to go from New York City to Miami, Florida, for the purpose of prostitution. The woman had been transported to Miami on October 20, 1941. After the defendant, his co-conspirator, and the victim, who was the complaining witness, had been arrested in Florida and had thereafter returned to New York, the complaining witness had a conversation with the co-conspirator in December, 1941, which seriously implicated the defendant. When the government, on the trial of the defendant, sought to introduce this conversation in evidence, defendant objected that it was not admissible, the conspiracy having ended when the victim arrived in Miami. The trial court admitted it, and defendant was convicted. This Court reversed the conviction on the ground that the testimony was not admissible as made in furtherance of the conspiracy since the conspiracy had clearly ended at the time the statement was made. It refused to accede to the government's argument (which we do not repeat here) that, since a subsidiary agreement to conceal is implicit in every conspiracy, the declaration was in furtherance of the original conspiracy.

Mr. Justice Jackson, in his concurring opinion, wrote a penetrating critique of the dangers of conspiracy prosecutions to the fair administration of justice. Even though he thoroughly excoriated the theory that there can be an implied conspiracy-to-conceal latent in every criminal conspiracy, he stated at pages 455–456:

> * * * Of course, if an understanding for continuous aid [concealment] had been proven, it would be embraced in the conspiracy by evidence and there would be no need to imply such an agreement.

In thus rejecting implied agreements to conceal, he recognized the very real possibility of actual, proved, agreements-to-conceal being an integral part of a conspiracy.

In *Lutwak* v. *United States, supra,* the indictment, charging Lutwak and others with conspiracy to defraud the United States in its administration of the immigration laws, alleged that the conspirators agreed to conceal their acts to prevent disclosure of the conspiracy. The substance of the conspiracy was that the defendants, veterans of the United States Armed Forces, would go abroad, enter into putative marriages, procure the entry of the alien spouses into the United States under the War Brides Act (59 Stat. 659, 8 U. S. C. 232), and then take steps to sever the legal matrimonial ties. Most of the evidence adduced on the trial consisted of testimony of the individual acts and declarations of the defendants. They contended that, since some of the acts and declarations were made after the conspiracy ended, they were not

properly restricted, when admitted, to the defendant who did the act or made the statement testified to. The critical issue, therefore, was when did the conspiracy end. Defendants insisted it ended when the last of the conspiratorial parties was admitted to the United States on December 5, 1947. The government urged that the agreement of the conspirators to conceal the conspiracy, as alleged in the indictment, protracted its life. The Court, after examining the record, stated at page 616:

> But there is no statement in the indictment of a single overt act of concealment that was committed after December 5, 1947, and no substantial evidence of any. Such acts as were set forth *and proved were acts that revealed and did not conceal the fraud.* Therefore, there is no evidence in the record to establish as a part of the conspiracy that the conspirators agreed to conceal the conspiracy by doing what was necessary and expedient to prevent its disclosure. [Emphasis added.]

It concluded that the agreement to conceal, though alleged in the indictment as a part of the conspiracy, "was not proved." This is far from saying that agreement to conceal the crime can never be proved. Indeed, the underlying assumption of the opinion is that such an agreement could be shown if it existed in fact.

In short, the issue of whether an agreement to conceal is actually a part of a conspiracy to violate federal laws is solely one of fact to be proved by the government and found by the jury under proper instructions.

C. THE ACTS OF CONCEALMENT HERE PROVED WERE PART OF AND IN FURTHERANCE OF THE ORIGINAL CONSPIRACY

Whether particular acts of concealment are in furtherance of a conspiracy is also a question of fact, and not of law. Its resolution depends on the nature and duration of the conspiracy and the relation of the acts of concealment with respect thereto. See Wharton, *Criminal Evidence* (11th ed. 1935), vol. 2, pp. 1200–1202. Thus the only real problem here with relation to the acts of concealment is a factual one. Was the original conspiracy, with its ramifications, including the initial agreement to conceal, still in existence when overt acts were performed during the period of limitations (October 25, 1951–October 25, 1954)? Were the overt acts of concealment during the period of limitations in furtherance of that original conspiracy, or were they in furtherance of a new conspiracy, entered into after the original conspiracy had terminated? The jury, under the judge's charge, which posed these very questions for its consideration (see *supra*, pp. 36–37), found that the overt acts of concealment performed during the period of limitations were part of, and in furtherance of, the initial conspiracy. The evidence also supports that aspect of the verdict.

As we have demonstrated, *supra*, pp. 48–54, the initial agreement among the conspirators, from the beginning, contemplated at least this much—the "fixing" of tax cases for those who would pay for such "services," concealment of the relationship among the conspirators, concealment of the action taken pursuant to the conspiracy for the purposes of protecting both the conspirators and the taxpayers.

It is fair to assume, on this record, that the first of these objectives—the "fixing" of tax cases—became less important before the crucial date, October 25, 1951, three years before the date of the indictment, October 25, 1954. As we have shown, the date of completion cannot be set as early as petitioners would fix it, with the decision not to prosecute in the Pattullo Modes case in January 4, 1949. The conspiracy was clearly in existence in the summer of 1950, when the attempt was made to get the Clover Company and its owners as customers of the ring. Normally, with this proof of a planned conspiracy of indefinite duration, the presumption of continuance would justify an inference that the conspiracy continued for the full time that Bolich was in office. But in the light of the fact that by June, 1951, the King Committee was investigating tax frauds in general, and that there was a possibility that it would investigate the Pattullo Modes case in particular, it is reasonable to conclude that the possibility of securing new business was somewhat curtailed.

The other objectives of the conspiracy, however, were obviously in full force, and in fact took on new impetus in the face of the King Committee investigation. Bolich was still in office when the King Committee started its investigations and continued as an employee of the bureau until November 16, 1951 (Gov't Ex. 1d). It was obviously tremendously important to all of the participants that their initial plan to conceal what they had done should continue. Moreover, the statute of limitations had not run against the taxpayers for whom favorable results had been

unlawfully accomplished. Under 26 U. S. C. (1940 ed.) 3748, the term for criminal liability for tax evasion was six years, and this period would not expire until 1953, since the last return was filed in 1947. Those paid-for results were clearly in danger and had to be protected.

The evidence discloses actions by the conspirators in complete accord with their original understanding. In June, 1951, petitioner Halperin, who made repeated trips to Washington, reported that there was a possibility that Pattullo Modes would be investigated. Immediately, the New York conspirators took action, calling in the taxpayers and warning them that they were not to talk to anyone. When one of the Pattullo Modes stockholders (Mrs. Segel) slipped and suggested enough to make the committee's investigator suspicious that all was not what it appeared to be, further action became necessary. *Supra,* pp. 31–32. But even then, the understanding that it was necessary to conceal the $100,000 bribe was evidenced by the fact that information as to the payment was withheld from the new attorney who was retained to represent the Pattullo Modes people (*supra,* p. 32). And not long thereafter, in December, 1951, within the period of limitation, Bolich showed his understanding of the need for concealment by denying that he had obtained the subpoenaed hotel records which would have shown his close connection with Grunewald (*supra,* pp. 32–33).

By the time of the Brooklyn grand jury investigation, in February, 1952, the object of protecting the taxpayers must finally, we think, be deemed to have been

abandoned by these conspirators. By this time, the conspirators were aware that the Pattullo Modes people were following their own course, and their actions thereafter, including the attempts to get the Gotham Beef people not to talk, and Grunewald's attempt to get his secretary "to forget" (see the Statement, *supra*, p. 35), can fairly be said to be in furtherance only of the object of concealing the operations of the conspiracy and the identity of the non-taxpayer conspirators.

There was not, however, as petitioners claim, a break between the abandonment of efforts to fix further tax cases and the later aspects of the conspiracy which concentrated on concealment. As we have stated, *supra*, pp. 48–54, the original conspiracy was a continuing one which was *affirmatively* shown in fact to have continued, *in all its aspects*, into the summer of 1950. There is nothing to indicate that it did not continue in all its aspects beyond that time, and the presumption, in the absence of proof to the contrary, is that it did so continue. *Hyde* v. *United States*, 225 U. S. 347, 369; *United States* v. *Kissel*, 218 U. S. 601, 607; *United States* v. *Perlstein*, 126 F. 2d 789, 798 (C. A. 3), certiorari denied, 316 U. S. 678; *United States* v. *Rollnick*, 91 F. 2d 911 (C. A. 2); *Eaker* v. *United States*, 76 F. 2d 267 (C. A. 10); *Telman* v. *United States*, 67 F. 2d 716 (C. A. 10), certiorari denied, 292 U. S. 650; *Coates* v. *United States*, 59 F. 2d 173 (C. A. 9); *United States* v. *Weinberg*, 129 F. Supp. 514 (M. D. Pa.), affirmed, 226 F. 2d 161 (C. A. 3), certiorari denied, 350 U. S. 933. There was a period of comparative quiescence, so far as the

record shows, from the summer of 1950 until the King Committee investigations in 1951, but the record also shows that the conspirators were in touch with each other during that period. Halperin made frequent trips to Washington up to June, 1951. Halperin continued to share an office with Davis, although Schopick had moved out in March, 1951 (R. 355). The manner in which the news of the possible investigations of the Pattullo Modes case was handled justifies an inference that the conspirators had remained in collaboration with each other. Thus, in June, 1951, before the King Committee had called for the Pattullo Modes file, and before the investigator for the Committee had been at Pattullo Modes, Halperin brought word from Washington that there was danger and that action had to be taken. Thereafter, there followed the series of efforts to carry out the purpose, planned from the beginning, to conceal the identity of the conspirators and the results accomplished by the conspiracy. *Supra,* pp. 31–35. The jury was justified in finding that all this was in accord with, and pursuant to, the still-continuing original conspiracy.

The fact that petitioners could not, in the beginning, have foreseen the particular contingency represented by the King Committee investigation is, as the majority below held (Vol. V, App. p. 304), unimportant. So long as the conspiracy was known by them to require active steps of concealment while they were in cooperation with each other and while their "fixed" tax cases were not fully closed, it was not necessary that the conspirators know in advance

the precise events which would call for action to carry out their agreement to conceal. It is enough that the overt acts of concealment were part of the ramifications of the plan which could reasonably be foreseen as a necessary or natural consequence of the unlawful agreement. *Pinkerton* v. *United States,* 328 U. S. 640, 648. See also *Bannon and Mulkey* v. *United States,* 156 U. S. 464, 468; *United States* v. *Manton,* 107 F. 2d 834, 848 (C. A. 2), certiorari denied, 309 U. S. 664; *Allen* v. *United States,* 4 F. 2d 688, 692 (C. A. 7), certiorari denied, *sub nom. Hunter* v. *United States,* 267 U. S. 597. In a mail fraud conspiracy, if use of the mails is a contemplated part of the conspiracy, it is unnecessary that the conspirators know in advance the specific use of the mails which forms the basis of the indictment. *Clarke* v. *United States,* 132 F. 2d 538 (C. A. 9), certiorari denied, 318 U. S. 789; *Spivey* v. *United States,* 109 F. 2d 181, 185 (C. A. 5), certiorari denied, 310 U. S. 631. So here, agreement to conceal any and all aspects of the conspiracy was part of the original plan. The specific form that concealment was to take did not have to be known in advance.

This, then, is the nature of the conspiracy which the evidence established: an initial conspiracy, which from the beginning contemplated three objectives,[14] continued uninterrupted into the period of limitations with the first objective somewhat impaired, the second overlapping the period of limitations, and the third clearly still operative during all the period of limita-

[14] To "fix" tax cases; to protect the results of such "fixing"; and to conceal the nature of the conspiracy and the identity of its participants.

tions. In that factual situation, the jury properly found that the initial conspiracy continued during the period of limitations and that the overt acts (although possibly only in furtherance of two of the three original objectives) were in furtherance of the original conspiracy. As we have pointed out, a conspiracy to conceal the fact that bribes have been given to influence official action would itself be a conspiracy to defraud the United States, distinct from the conspiracy to give or take bribes. Hence, the fact that one of the three criminal objectives of this conspiracy came (of necessity) to an end before the period of limitations does not mean that the whole conspiracy to commit federal crimes had also come to an end. If counterfeiters planned, not only to make counterfeit but to pass it, it would not occur to anyone that the conspiracy had ended after the counterfeit was made but before it was passed. So here, the conspirators planned at least two crimes, to have official action influenced and to conceal official wrongdoing. The fact that one objective had been abandoned does not mean that the conspiracy itself had come to an end.

The recognition of the continuous nature of the conspiracy to conceal revealed by the particular facts of this case will not, as the dissent below suggests, mean that any conspiracy can be indefinitely extended beyond the period of limitations. The duration of a conspiracy does not depend on any magic words in the indictment or notions of the prosecutor; it depends on the facts proved at the trial and found by the jury. If conspirators act together for years in furtherance

of crime, the conspiracy is properly treated as lasting that long. If they do not, the finding that the conspiracy did not continue will flow from these facts, and will be made by the jury or, if necessary, by a trial or appellate court. The judgment of the jury and of the courts below that this conspiracy did last into the period not barred by the statute of limitations is, however, firmly based on the evidence in this case. The bar of the statute of limitations is not being denied to conspirators after years of inactivity and separation, nor is a conspiracy being stretched beyond its real terminal point.

It is important to stress that the question before this Court is not one of law, but of fact—whether the evidence supports the conclusion reached by the jury and the two courts. They believed, as the facts warranted, that the conspirators from the start contemplated active and continuing acts of concealment in relation both to their general activities and to the particular tax cases which had not been fully closed; and that the particular acts of concealment during the period of limitations were part of the original, and still continuing, agreement. Faced with such a finding of fact, the function of this Court—if it wishes to review the evidence at all—is to decide merely whether "there was some competent and substantial evidence before the jury fairly tending to sustain the verdict." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 254; *Glasser* v. *United States*, 315 U. S. 60, 80. Taking the evidence, as it must be taken, in the light most favorable to the government (*Glasser* v. *United States, supra*), the facts proved, and the infer-

ences reasonably to be drawn therefrom, fully support the jury's verdict.

II

THE TRIAL COURT PROPERLY PERMITTED PETITIONER HALPERIN TO BE QUESTIONED AS TO WHETHER HE HAD CLAIMED HIS CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION BEFORE A GRAND JURY WITH RESPECT TO QUESTIONS HE ANSWERED AT THE TRIAL, AND PROPERLY SUBMITTED TO THE JURY THE ISSUE OF HALPERIN'S CREDIBILITY AS A WITNESS ON THE BASIS OF THAT EVIDENCE

Eight of the nineteen questions set forth in the order granting the petitions for writs of certiorari (*supra*, pp. 2–6) are concerned with the government's efforts to impeach the credibility of petitioner Halperin (who alone of all the defendants took the witness stand) by bringing out the fact that, before the Brooklyn grand jury (not the one which returned the indictment), Halperin had claimed his privilege as to matters about which he testified on direct examination at the trial. For example, Halperin was asked if he ever held in escrow money paid by Gotham Beef which he delivered after the decision not to prosecute. He replied that he held the money in escrow but did not deliver it. It was shown that, before the grand jury, when asked whether he had held the money in escrow, he had refused to answer on the ground that the answer might incriminate him (R. 688). Similarly, Halperin denied making a telephone call to Grunewald relative to an appointment for Davis with Bolich. It was shown that, when asked before the grand jury whether he made such a tele-

phone call, Halperin had claimed the privilege against self-incrimination (R. 689–690). The same pattern was followed as to a number of other questions.[15]

At the conclusion of the trial, petitioner Grunewald requested the court to instruct the jury that (R. 774):

> An innocent man may honestly claim that his answers may tend to incriminate him.

The court refused to give this charge to the jury *in haec verba*. It did charge in this regard as follows (R. 748):

> During the cross-examination of one of the defendants, the government questioned the defendant as to his previous statements before the Brooklyn Grand Jury in which he refused to answer certain questions on the ground that answers to them might tend to incriminate him. These questions related to matters similar to those to which the defendant testified at this trial when he took the stand. No witness is required to take the stand or required to give testimony that might tend to incriminate him; but when a defendant takes the stand in his own defense at a trial, it is proper to interrogate him as to previous statements which he may have made under oath concerning the same matter, including his assertion of his constitutional privilege to refuse to testify as to those matters before a grand jury. You may

[15] The questions were: whether Halperin had filed a power of attorney in the Clover case (R. 683–684); whether he had ever met Oliphant (R. 686–687); whether he knew Max Steinberg, a group chief in the New York office of the Internal Revenue Service (R. 689); whether he knew Grunewald (R. 690–691); whether he knew Tobias of Gotham Beef (R. 692–693).

use this evidence of a defendant's prior assertions of the Fifth Amendment *for the sole purpose of ascertaining the weight you choose to give to his present testimony* with respect to the same matters upon which he previously invoked his privilege.

The defendant had the right of asserting the Fifth Amendment, when he appeared before the Grand Jury, and I charge you that you are not to draw any inference whatsoever as to the guilt or innocence of the defendant in this case by reason of the fact that he chose to assert his unquestioned right to invoke the Fifth Amendment on that previous occasion. However, it was proper for the Government to question the defendant with respect to his previous invocation of the Fifth Amendment, but you may consider this evidence of his prior assertions of the Fifth Amendment only for the purpose of ascertaining the weight you choose to give to his present testimony with respect to the same matters upon which he previously asserted his constitutional privilege. It is not to be considered in a determination of the guilt or innocence of any co-defendant. [Emphasis added.]

All three petitioners contend (No. 183, Pet. 15–16; No. 184, Pet. 10–17; No. 186, Pet. 17–18) that the trial court erred when it permitted the government to impeach the credibility of petitioner Halperin by thus showing on cross-examination that he had previously, when appearing before the grand jury under subpoena, invoked the Fifth Amendment privilege against self-incrimination in response to similar ques-

tions. The court below considered this same contention and rejected it, saying (Vol. V, App. 310):

> * * * *Raffel* v. *United States*, 271 U. S. 494, resolved the issue thus raised in favor of permitting such questioning and we have nothing to add to what has already been written on the subject by this court in *United States* v. *Gottfried*, 2 Cir., 165 F. 2d 360, 367, and n. 18, and the cases there cited.

Petitioners, relying on the dissenting opinion of Judge Frank in the court below, now urge that the rule of the *Raffel* case not only does not apply in this instance but also that its rationale has been, or should be, rejected by this Court. It is the government's position, on the other hand, that *Raffel* is controlling and that this Court has not, and should not, reject its reasoning.

A. ON THIS ISSUE, RAFFEL V. UNITED STATES, 271 U. S. 494, CONTROLS.

1. In the *Raffel* case, 271 U. S. 494, at a trial before a petit jury on a charge of conspiracy to violate the National Prohibition Act, a prohibition agent had testified that, after the search of a drinking place, Raffel admitted that the place belonged to him. Raffel did not avail himself of his statutory privilege to testify in his own behalf. The jury failed to reach a verdict. Upon the second trial of Raffel, the prohibition agent gave the same testimony as at the first trial. Raffel then took the witness stand and denied making any admission to the prohibition agent. Raffel, after admitting that he had been present at his first trial when the same prosecuting witness had given the same testimony, was asked questions by the

court which required him to disclose that he had not testified at the first trial, and to explain why he had not done so. He was convicted on the second trial. The Court of Appeals for the Sixth Circuit certified to this Court the following question (271 U. S. at 496):

> Was it error to require the defendant, Raffel, offering himself as a witness upon the second trial, to disclose that he had not testified as a witness in his own behalf upon the first trial.

Mr. Justice Stone, writing for the Court, stated that, "The answer to the question certified is 'No'."

In reaching its decision in the *Raffel* case the Court, after noting the conflict among the states on this question, pointed out that the Fifth Amendment, on the one hand, protected a person from being compelled to be a witness against himself, and that the statute (Act of March 16, 1878, c. 37, 20 Stat. 30), on the other hand, afforded a defendant an opportunity to be a witness for himself if he so elected. Recognizing that "the immunity from giving testimony is one which the defendant may waive by offering himself as a witness," the Court then stated at page 497:

> * * * When he takes the stand in his own behalf, he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined as to the facts in issue. * * * He may be examined for the purpose of impeaching his credibility. * * * His failure to deny or explain evidence of incriminating circumstances of which he may have knowledge, may be the basis of adverse inference, and the jury may be so instructed. * * * His waiver is not partial; having once cast

> aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing. [Citations omitted.]

After pointing out that the value of such testimony depends upon the nature of the answers elicited, and that their weight is for the jury alone to assess, the Court disposed of Raffel's contention that such cross-examination, if permitted, would constitute compulsion on a defendant to testify at the first trial as "refinements * * * without substance." It concluded:

> The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness. We can discern nothing in the policy of the law against self-incrimination which would require the extension of immunity to any trial or to any tribunal other than that in which the defendant preserves it by refusing to testify.

In this unequivocal statement that the immunity from self-incrimination is limited to the "trial" or "tribunal" in which the defendant claims it, the Court makes it clear that it is of no consequence whether the privilege is claimed before a petit or a grand jury. It therefore appears beyond doubt that the principle of the *Raffel* case applies with full force to the present situation.

The attempt to distinguish the *Raffel* situation on the ground that it involved failure to take the stand at a prior trial whereas this case involves a witness

before the grand jury has repeatedly been rejected.[16] *Berra* v. *United States,* 221 F. 2d 590, 597 (C. A. 8), affirmed on other grounds, 351 U. S. 131;[17] *Viereck* v. *United States,* 139 F. 2d 847, 851–852 (C. A. D. C.), certiorari denied, 321 U. S. 794; *United States* v. *Gottfried,* 165 F. 2d 360, 367 (C. A. 2), certiorari denied, 333 U. S. 860; *United States* v. *Klinger,* 136 F. 2d 677, 678 (C. A. 2), certiorari denied, 320 U. S. 746; *United States* v. *Groves,* 122 F. 2d 87, 91 (C. A. 2), certiorari denied, 314 U. S. 670; *United States* v. *Mortimer,* 118 F. 2d 266, 268 (C. A. 2), certiorari denied, 314 U. S. 616; *United States* v. *Buckner,* 108 F. 2d 921, 927–928 (C. A. 2), certiorari denied, 309 U. S. 669; *Tomlinson* v. *United States,* 93 F. 2d 652, 656 (C. A. D. C.), certiorari denied, 303 U. S. 646.

Since the privilege against self-incrimination, as guaranteed by the Fifth Amendment, applies to all persons equally before all official tribunals, it is of

[16] The dissenting judge in the court below asserts that there are valid reasons why a witness might be reluctant to testify before a grand jury which do not apply to a trial itself (Vol. V, App. 324). The pertinence of these asserted differences is that they lessen the apparent contradiction between refusing to testify in one and taking the stand in the other. But to deny the introduction of the evidence on that ground would encroach upon the province of the petit jury whose function it is to pass judgment on the credibility of the explanation. The difference between the proceedings is not so great as to make the refusal to testify so irrelevant that it cannot be considered by the petit jury. Probably, moreover, the balance of the apparent desirability of testifying works in favor of the grand jury, where the witness, whether innocent of guilty, will frequently seize the opportunity to exculpate himself before an indictment is brought.

[17] The issue was raised in the petition for certiorari (No. 766, O. T. 1954), but certiorari was not granted on this point.

no importance where the defendant asserted it. What is of importance is whether or not the defendant, by his own act, subsequently waives the immunity he formerly asserted. Halperin, like Raffel, by voluntarily offering to be a witness in his own defense, must be held to have waived the privilege. The argument that in *Raffel* the defendant had a choice as to whether or not to testify at his first trial, whereas a witness before a grand jury must testify if he does not claim the privilege, misinterprets the reasoning of the *Raffel* decision and involves instead the issue discussed in Point III, *infra,* dealing with the power to call a possible defendant before a grand jury. Halperin before the petit jury gave his version of events, all designed to show innocence. Before the grand jury he said answers to the same questions would tend to incriminate him. While the two positions are not irreconcilably conflicting, they are different. Such a difference was properly brought to the attention of the jury whose duty it was to weigh the credibility of the trial testimony. The decision in *Raffel* turned upon the defendant's choice in testifying at his trial, and not upon his choice in exercising the privilege on a previous occasion. The predicament in which the defendant in the *Raffel* case found himself was no more of his own making than that of a witness before a grand jury; obviously, it was not his choice to be put to trial. And the privilege of a defendant to refrain from taking the stand is of no less dignity than that of a witness to refrain from giving incriminating answers.

The recent stress by this Court on the fact that an innocent person may claim the privilege (*Slochower* v. *Board of Higher Education*, 350 U. S. 551) does not negate the fact that a guilty person may also claim it. If the criterion of admissible evidence is the development of the truth,[18] the pursuit of truth is best served by letting the jury have all the facts. The claim before the grand jury that the answers would tend to incriminate Halperin might or might not be inconsistent with his protestations at the trial of complete innocence. It was certainly, as we have just noted, a different answer. Halperin was entitled to explain that apparent inconsistency, as he did, by developing before the jury the reasons why he felt obliged to claim the privilege (R. 703–708). The jury was then in a position to determine the issue of credibility on the basis of all the facts, not a partial version. To say that a defendant who takes the witness stand in his own behalf is not subject to impeachment by cross-examination, on the grounds that it violates the Fifth Amendment, would convert the privilege against self-incrimination from a shield for the protection of witnesses to a device to protect perjury. Cf. *Walder* v. *United States*, 347 U. S. 62.

The argument that this rule places a person under pressure to testify at the earlier proceeding for fear of the consequences of silence in the event he later chooses to testify was carefully considered in *Raffel* and was rejected with the holding that the "safe-

[18] "The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth." *Funk* v. *United States*, 290 U. S. 371, 381.

guards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do." Any person involved to any degree in a criminal act is under this type of pressure as to anything he does or says that may later be proved to be contrary to the version of events he chooses to place before a jury. So long as evidence is logically relevant, as the prior claim of privilege undoubtedly is, so long as the evidence has not been improperly obtained (a matter we discuss *infra,* pp. 85–97), it ought properly to be before the jury.

Our whole system of criminal justice rests on the assumption that juries are capable of making intelligent judgments on the facts, particularly in relation to issues of credibility. The judgment involved in assessing the weight to be given inconsistent action with respect to the claim of privilege is no more difficult than the appraisal involved in resolving other issues of credibility. It is no more damaging to a defendant to point out prior inconsistent silence, subject to explanation as to the reason for the claim of privilege—it is, in fact, probably less damaging—than it is to bring out, as bearing on credibility, a defendant's prior conviction for a wholly different crime.[19] It is no more difficult—probably less diffi-

[19] It would be inconsistent with the proper view of the privilege against self-incrimination, as this Court has expressed it, to act on the assumption that invocation of the privilege has a derogatory connotation, or implies guilt, or should be considered, in itself, as injurious to the person making the claim. See *Ullmann v. United States*, 350 U. S. 422, 426–429; *Slochower v. Board of Higher Education*, 350 U. S. 551, 557–

cult—for a jury to follow instructions as to the weight to be given the prior inconsistent silence than it is to follow instructions to keep separate the confession of a codefendant. The allocation of law to the court and facts to the jury assumes that a jury is capable of following instructions. *Delli Paoli* v. *United States*, 352 U. S. 232, 242; *Opper* v. *United States*, 348 U. S. 84, 95.

The short of it is that, when a defendant exercises his right to take the stand, he waives his privilege against self-incrimination and assumes the role of a witness with all the attendant benefits and risks that attach to it. *Reagan* v. *United States*, 157 U. S. 301; *Fitzpatrick* v. *United States*, 178 U. S. 304; *Powers* v. *United States*, 223 U. S. 303. He may be cross-examined as to the details of matter within the scope of his direct examination. *Branch* v. *United States*, 171 F. 2d 337 (C. A. D. C.); *Taylor* v. *United States*, 19 F. 2d 813 (C. A. 8). He is subject to the usual rules of impeachment. *Greer* v. *United States*, 240 Fed. 320 (C. A. 8), affirmed, 245 U. S. 559; *United States* v. *Brown*, 40 Fed. 457 (E. D. S. C.). He may be examined regarding a prior conviction for a felony as affecting his credibility. *United States* v. *Empire Packing Co.*, 174 F. 2d 16 (C. A. 7), certiorari denied, 337 U. S. 959; *Weiner* v. *United States*, 20 F. 2d 522 (C. A. 3); *Mercer v. United States*, 14 F. 2d 281 (C. A. 3); *Krashowitz* v. *United States*, 282 Fed. 599 (C. A. 4). To argue, as does petitioner Halperin (Pet. Br. in No. 184,

558. "To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it" (350 U. S. at 428–429).

pp. 31–33), that laying a defendant open to complete cross-examination, when he is on the witness stand, deprives him of some of the indicia of a witness accorded him by 18 U. S. C. 3481, is self-contradictory. Only if a defendant, like any other witness, is subjected to complete cross-examination within the permissive limits of the applicable rules, as was petitioner, can he be said to be treated fully and completely as a witness within the intendment of the statute. That is the rationale of *Raffel,* and it is as sound today as it was when issued.

2. Petitioners, relying in large measure on the dissenting opinion of Judge Frank (Vol. V, App. 316–357), urge that *Raffel* has been nullified by the subsequent decisions of this Court in *Johnson* v. *United States,* 318 U. S. 189, and *Slochower* v. *Board of Higher Education,* 350 U. S. 551. But there is a radical difference between the facts in those cases and the situation before the Court in *Raffel* and here.

In *Johnson* v. *United States,* 318 U. S. 189, the defendant was indicted for income tax evasion for the years 1935, 1936, and 1937. He defended on the theory that he had failed to return all his income for those years because of a mistaken but sincere belief that he was required to report only the net balance remaining after deducting political contributions. On direct examination, the defendant admitted receiving $1,200 per week from a numbers syndicate for police protection during the period from July, 1935, through October, 1937, but denied receiving payments in November and December. It was material to the government's case to prove the payments for these last

two months of 1937. Therefore, the prosecution attempted to establish a basis for the inference that the weekly "pay-off" had continued through November and December, 1937, by showing a continuous course of dealing, as to source of funds and amount, which began in 1935 and continued on through 1938. To that end, the accused was asked, on cross-examination, whether he had received payments in 1938, a clearly relevant inquiry, as the trial judge held. The accused then claimed his privilege against self-incrimination, which the judge sustained (despite the *Raffel* rule). Thereafter he allowed the prosecution and the jury to use defendant's silence as evidence of guilt.

This Court held that, regardless of the correctness of the ruling sustaining the privilege, the judge, having once sustained it, ought not to have allowed the refusal to be used as it was. The opinion states (318 U. S. at 197):

> The ruling of the court gave the petitioner the choice between testifying and refusing to testify as to his 1938 income. An accused having the assurance of the court that his claim of privilege would be granted might well be entrapped if his assertion of the privilege could then be used against him. His real choice might then be quite different from his apparent one. In this case it would lie between protection against an indictment for 1938 *and the use of his claim of privilege as evidence that he did in fact receive the income during the last two months of 1937.* Elementary fairness requires that an accused should not be misled on that score. If advised by the court that his claim of privilege though granted would be employed

> against him, he well might never claim it. If he receives assurance that it will be granted if claimed, or if it is claimed and granted outright, he has every right to expect that the ruling is made in good faith and that the rule against comment will be observed. * * * [20] [Emphasis added.].

The error which the Court found in the *Johnson* case, therefore, lay in the fact that an unfavorable *inference of guilt* was allowed to be drawn from the assertion of the privilege as to the particular facts as to which the privilege was claimed and sustained. That is not this case. Here, the jury were specifically instructed that no inference was to be drawn from the claim of privilege *per se*. Petitioner Halperin elected to testify and gave wholly innocent, exculpatory, answers to certain questions, staking his credibility, in part, on the answers. The impeachment consisted in the fact that, at a different time, in different circumstances, he gave different answers to those same questions. He was entitled to explain the reason for the difference, but the fact of difference remained for the jury to weigh. Petitioner's prior silence was not being used as affirmative evidence of guilt; it was being used merely as some evidence of possibly inconsistent action bearing on the issue of credibility voluntarily posed by the petitioner.

Similarly, in *Slochower* v. *Board of Higher Education,* 350 U. S. 551, the fundamental error which the Court found lay in fact that the claim of privilege was *per se* permitted to be the basis of an inference of

[20] The final holding in the case was that the accused waived the erroneous comment.

guilt. The issue was the constitutional validity of the section of the Charter of the City of New York which provided that, whenever an employee of the city utilized the privilege against self-incrimination to avoid answering a question relating to his official conduct, his term of employment would terminate, and he would become ineligible for employment. The "summary dismissal" condemned in the holding was emphasized by the Court throughout its opinion as the vitiating factor in the charter provision. Slochower was being deprived of his employment solely because he claimed his privilege, and an implication of guilt was being based on that claim. He was being required to pay a price for claiming the privilege which he had not waived.

The argument that this Court is, in its general approach, withdrawing from the position taken in *Raffel* is largely based on the many recent opinions in which the Court has expressed ungrudging support for the constitutional privilege against self-incrimination and emphasized its importance to our judicial system. Without discussing whether or not this is a "change in approach," it must be noted that the Court has not withdrawn one iota from the view that the privilege can be waived. Cf. *Rogers* v. *United States*, 340 U. S. 367. And the point here, as in *Raffel*, is that the witness did waive the privilege. Such unfavorable inferences as to his credibility as arise result, not from the claim of privilege, but from the fact that Halperin chose at different times to give differing answers to the same question.

3. The dissenting opinion below in effect recognizes that there is as much reason to allow a defendant to be cross-examined as to his prior claim of privilege as there is as to other issues bearing on credibility, for a large part of the dissent discusses the undesirability of permitting a defendant to take the stand. That question of policy, however, is not here. The right of a defendant to be a witness rests upon the statute (Act of March 16, 1878, c. 37, 20 Stat. 30, now 18 U. S. C. 3481) that removed the common law disability of a party of record in a proceeding from being a witness. If that policy is to be changed, Congress must change it. But it may be well to note that the original statute unquestionably represented the general judgment of lawyers and laymen that the policy was a desirable one. There would be little support today for the position that one whose liberty and, perhaps, life is at stake should not be permitted to speak in his own behalf. As this Court said of the judge-made perjury rule in *Weiler* v. *United States*, 323 U. S. 606, 610:

> The rule has long prevailed, and no enactment in derogation of it has come to our attention. The absence of such legislation indicates that it is sound and has been found satisfactory in practice.

That statement, we think, is applicable both to the statute permitting a defendant to take the stand and to the interpretation of the consequences of taking the stand, as laid down by *Raffel* and the other decisions cited, *supra*, p. 73.

B. THE TRIAL COURT DID NOT ERR IN THE CHARGE TO THE JURY ON THIS ISSUE

As a corollary to the main argument that the prosecution's efforts to impeach the credibility of Halperin were improper, petitioner Halperin contends that the trial court erred when it refused to instruct the jury that "an innocent man may honestly claim that his answers may tend to incriminate." This Court has recognized that this is a correct statement. *Slochower* v. *Board of Higher Education,* 350 U. S. 551, 557; *Ullmann* v. *United States,* 350 U. S. 422. There is, however, no requirement that a trial court must instruct a jury in *haec verba* as requested by counsel. It is not error to refuse to instruct in language submitted by counsel if the charge given correctly states the law applicable to the case. *Sugarman* v. *United States,* 249 U. S. 182, 185; *United States* v. *International Fur Workers Union,* 100 F. 2d 541, 546 (C. A. 2), certiorari denied, 306 U. S. 653.

Though the court refused to charge the jury in the language requested, it did in substance tell them that an innocent man could properly invoke the Fifth Amendment and refuse to answer questions on the ground that the answers might tend to incriminate him. In this regard the court charged (R. 748):

> * * * I charge you that you are not to draw any inference whatsoever as to the guilt or innocence of the defendant in this case by reason of the fact that he chose to assert his unquestioned right to invoke the Fifth Amendment on that previous occasion.

Petitioner's language subtly changes the emphasis. It emphasizes innocence, whereas the claim of privilege is no more than neutral. It ignores the at least *prima facie* inconsistency of his position in testifying at the trial in an effort to clear himself as to facts which he had declared, if revealed, would tend to incriminate him. The charge as given more accurately placed the claim of incrimination in its logical setting. It correctly pointed out that the impeachment potential of the cross-examination of Halperin stemmed not from his prior claim of privilege as such, but in relation to his subsequent act of taking the stand in an apparent effort to exonerate himself.

The whole charge on this issue (R. 748, *supra*, pp. 68–69) correctly stated the law. The court narrowly limited the use the jury could make of the evidence that Halperin had previously refused to answer the same questions. Twice in the course of the instruction the court restricted the jury to considering Halperin's prior assertion of the protection of the Fifth Amendment only for the purpose of ascertaining the weight they would give to his testimony during the trial with respect to the same matters on which he had claimed the privilege. It was made clear that the prior claim bore only on the issue of credibility. And the judge pointed out, clearly and accurately, that no inference could be drawn from the mere fact that the privilege had been asserted. The charge was therefore in full accord with applicable principles.[21]

[21] Assuming a finding of error as to Halperin on this issue, there would arise the question as to whether the error affected

III

THE GRAND JURY INVESTIGATING TAX FRAUDS PROPERLY SUBPOENAED PETITIONER HALPERIN TO FURTHER ITS INVESTIGATION NOTWITHSTANDING THE FACT THAT HE HAD ALREADY BEEN IMPLICATED TO SOME EXTENT IN THE FRAUDS

Petitioner Halperin raises the question (Halperin Br. 3, 35) of whether it "constitute[s] due process to subpoena a person to testify before a Grand Jury in an investigation of which he is the primary target, and thereby permit an examination before trial of a *de facto* defendant?" As thus phrased, the question assumes a fact which the record does not establish—that Halperin was the "primary target" of the grand jury which subpoenaed him as a witness. The record shows that this was not the situation; that at most the Brooklyn grand jury, which returned no indictments, only had reason for suspicion that he might be implicated in the larger general crimes which they were investigating. On this basis neither considerations of policy nor judicial authority require a holding that it was improper to call him before the grand jury.

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the other petitioners. Judge Frank, in his original dissent, considered that the error required reversal as to Halperin alone. In disposing of the argument that if there were error it was harmless, the dissenting judge stated that since there had been an invasion of a constitutional right the error could not be deemed to be harmless. Obviously, this reasoning applies to the use of the evidence against Halperin only, since the constitutional right was personal to him. On that reasoning, the other two petitioners can take no advantage from the error, if error there was.

A. HALPERIN WAS NOT THE PRIME TARGET OF THE BROOKLYN GRAND JURY NOR EVEN A CLEAR POTENTIAL DEFENDANT

1. The record discloses that all counsel for the parties to these cases entered into a stipulation, which was filed with the trial court, wherein they agreed that it was the purpose of the grand jury duly empaneled by the United States District Court for the Eastern District of New York (known in this case as the Brooklyn grand jury) on February 18, 1952, to conduct a general "inquiry and investigation into possible violations of the Internal Revenue Laws of the United States and into possible violations of law in the administration and enforcement of the Internal Revenue Laws and in the administration of the affairs of the Bureau of Internal Revenue and the Internal Revenue Service in the Eastern District of New York" (R. 931). It is highly questionable whether, in any such generalized investigation, there could be said to be any "prime target" at all. But if there were any, then manifestly the prime targets would necessarily have to be the corrupt persons in the Internal Revenue Service. The fact that the Brooklyn grand jury returned no indictments (R. 700) in itself indicates that it had not subpoenaed petitioner Halperin as a prospective defendant or treated him as a *de facto* defendant. Even in jurisdictions which, as discussed *infra*, hold that an indictment must be dismissed if a *de facto* defendant has been called to testify, the single fact that the accused was not indicted by the grand jury which called him, but by a later one, has led the state courts to conclude that the defendant was not the

primary target of the first grand jury proceedings. They have refused to invalidate the indictment in such cases. *People* v. *Elite Distributing Co.*, 76 Misc. 577, 137 N. Y. S. 235; *Commonwealth* v. *Gross*, 172 Pa. Super. 85, 92 A. 2d 251; *Commonwealth* v. *Kilgallen*, 175 Pa. Super. 52, 103 A. 2d 183.[22]

2. Petitioner's contention that he was the primary target of the Brooklyn grand jury's investigation rests on the argument of his counsel that since the testimony of Marks, Mrs. Segel, Greenstein, Tobias, and Berman relative to petitioner was the same before the grand jury as they gave when witnesses for the government during the trial, the grand jury must have subpoenaed petitioner as a prospective defendant (R. 696–698). Assuming that testimony before the grand jury by the taxpayer witnesses (before Halperin was called) was consistent with their testimony at the trial, this does not show that Halperin was then called as a potential defendant. All that the grand jury could know from these witnesses was that Halperin was called in by the taxpayers' attorneys, Schopick and Davis, as co-counsel who could arrange for a decision not to prosecute through a Washington associate. The identity of the Washington associate had, as noted *supra*, pp. 52–53, been carefully concealed from the taxpayers. The person or persons in the Internal Revenue Service through whom this unknown

[22] On October 25, 1954, a grand jury of the Southern District of New York returned the seven count indictment on which petitioners were tried in this case (R. 4). Nothing in the record indicates that petitioner Halperin was either subpoenaed to appear before this grand jury or did appear before it as a witness.

Washington associate may or may not have acted was even less identified to the taxpayers. Under these circumstances, it is a reasonable inference that the grand jury was more interested in tracking down the Washington associate and his connections than they were in making a case against petitioner Halperin.

Nor does the fact that a hypothetical statement—made by Davis to his attorney concerning all the facts and circumstances of the conspiracy—was submitted to the Brooklyn grand jury establish that Halperin was subpoenaed in the role of a *de facto* defendant (R. 388–399, 696–8, 700–2). Even if this statement was considered by the grand jury, it was in hypothetical form and would not have identified the "Washington associate".

Indeed, if the circumstances disclosed by the present record were the end results sought in the investigation, the inquiry would not have been in Brooklyn at all. It can be assumed that the Brooklyn prosecutor knew, what the defendants themselves recognized in their conferences before they were called (R. 360–361), that they could not be indicted in Brooklyn because no overt act was committed in the Eastern District of New York.

At most, the Brooklyn grand jury had reason to believe that Halperin was involved in the larger question of fraud that they were investigating. They could not have been certain even of that. All the taxpayers who testified were, by their own testimony, persons whose regard for truth and honesty was not unlimited. The possibility existed that they were imputing to their attorney actions which he had not

taken. In his own testimony Halperin stated that the Brooklyn grand jury was trying to get the books and records of Schopick and Davis "in order to examine the clients to make a case against *them*" (R. 682). [Emphasis added.]

In the light of this record, the argument of petitioner that "He should not have been called before the Grand Jury at all, since by doing so, the Government was seeking an unsanctioned examination before trial" (Halperin Br. 35) is an unwarranted conclusion. Petitioner appeared before the Brooklyn grand jury as a witness and not as a defendant. As a witness he answered many questions put to him, but also invoked his privilege of silence under the Fifth Amendment (R. 684, 686, 688–690, 693). His claim of privilege against self-incrimination in response to certain questions demonstrates that he was fully aware of his rights and alert to protect them.

The federal decision which seems most favorable to petitioner's cause, when applied to these facts, supports the view that he was not a primary target and that his basic premise is untenable. In *United States* v. *Scully*, 225 F. 2d 113 (C. A. 2), the evidence disclosed that the defendant, as the purchasing agent for two companies constructing air bases under a government contract entitling them to costs plus a fixed fee, so manipulated the placing of purchasing orders as to defraud the government. At the time when he was called as a witness before the grand jury, that body had already learned that the defendant had deposited $4,000 more than he had earned in his bank deposit, and had heard testimony that he had evaded competi-

tive bidding procedures on at least twenty occasions. Yet, the Court of Appeals felt free to say at p. 114:

> * * * it is far from clear on this record that appellant was marked for prosecution, or that the prosecution was aimed at him, or that he was, at the time he testified, in any sense accused of the crime subsequently charged against him.

In other words, Scully was not yet a "*de facto* defendant" when he was called, although he plainly was implicated. There the grand jury knew that Scully had an outside source of income, and had been told, inferentially, that it resulted from his habit of rigging contracts. Here, the grand jury had heard testimony that some taxpayers had tried to "fix" tax cases, and that Halperin was their contact. But the grand jury did not know, when Halperin was called, if Halperin had Washington or official contacts, or who they were, if they existed. Furthermore, they did not know whether Halperin had "fixed" the taxpayers' cases, even assuming he was in a position to do so. If Scully was not yet "aimed at" or "accused," then Halperin has far less cause to claim that status. If Scully was not "marked for prosecution," then Halperin was not a target in any sense. Accordingly, petitioner's premise that he was the target of the investigation must be rejected.

3. The question of whether a "*de facto* defendant" may be called before a grand jury, the situation discussed in the cases on which petitioner relies, is thus not presented here.

On that issue, there is a difference of views expressed in federal decisions although there is no

actual decision dismissing an indictment on such ground. The Second Circuit said in *United States* v. *Scully, supra*, 225 F. 2d 113, 116 (C. A. 2):

> It is at least clear that a prudent prosecutor, to forestall the possibility of error, will in such cases give a warning [of the right not to incriminate oneself]. Indeed, one would suppose that, as a matter of ethics or fair play or policy, a prosecutor would in all cases refrain from calling as a witness before a Grand Jury any person who is *de jure* or *de facto* an accused.[23]

In *Powell* v. *United States*, 226 F. 2d 269, 274 (C. A. D. C.), where the prosecutor had been specifically directed to present to the grand jury "evidence of the activities of Clyde L. Powell," and there was other evidence which established "clearly and convincingly" that Powell was the person against whom an indictment was being sought by this grand jury investigation, the Court of Appeals observed in a decision resting on other grounds that "Under these circumstances there is a serious question whether Powell was subject to subpoena as a witness for the Government". See also *United States* v. *Edgerton*, 80 Fed. 374 (D. Mont.).

There is, however, much language to the contrary. See *O'Connell* v. *United States*, 40 F. 2d 201, 205

[23] The petitioner refers to *United States* v. *Minker*, 350 U. S. 179, as supporting his position. However, that case holds only that Section 235 (a) of the Immigration and Nationality Act of 1952, 8 U. S. C. 1225 (a), does not empower an immigration officer to call as a witness one who is the subject of a denaturalization proceeding under Section 340 (a) of the Act. Because all of the opinions in *Minker* are careful to point out that the case involved the use of a subpoena in an administrative, rather than a judicial, proceeding, its rationale does not apply here.

(C. A. 2), certiorari granted, 281 U. S. 716, certiorari dismissed, 296 U. S. 667, saying that the Fifth Amendment is "an option of refusal and not a prohibition of inquiry"; *United States* v. *Kimball*, 117 Fed. 156, 161 (S. D. N. Y.), saying that "* * * summoning a person, a defendant, before a [grand] jury, and asking him to answer, is not per se a violation of the constitution, * * *"; *United States* v. *Price*, 163 Fed. 904, 906 (S. D. N. Y.); *United States* v. *Benjamin*, 120 F. 2d 521 (C. A. 2); *United States* v. *Manno*, 118 F. Supp. 511, 517 (N. D. Ill.).

Similarly, there is diversity of opinion in state courts as to whether or not a *de facto* defendant may be called before a grand jury and sworn as a witness. In some states, courts say that the indictment should be invalidated if the court concludes that the indicting grand jury which subpoenaed the defendant was actually conducting an investigation directed against him. In this grouping may be found Illinois,[24] Minnesota,[25] Missouri,[26] North Carolina,[27] New York,[28] and perhaps

[24] *People* v. *Cochran*, 313 Ill. 508, 145 N. E. 207.

[25] *State* v. *Fraiseth*, 16 Minn. 296; *State* v. *Gardiner*, 88 Minn. 130, 92 N. W. 529; *State* v. *Cotteau*, 198 Minn. 433, 270 N. W. 144.

[26] *State* v. *Faulkner*, 175 Mo. 546, 75 S. W. 116; *State* v. *Naughton*, 221 Mo. 398, 120 S. W. 53; *State* v. *Capertop*, 276 Mo. 314, 207 S. W. 795; *State* v. *Bright*, 263 S. W. 559 (Mo. App.).

[27] *State* v. *Frizell*, 111 N. C. 722, 16 S. E. 409.

[28] *People* v. *Haines*, 1 N. Y. S. 55; *People* v. *Gillette*, 126 App. Div. 665, 111 N. Y. S. 133; *People* v. *Bermel*, 71 Misc. 356, 128 N. Y. S. 524; *People* v. *Rausch*, 140 Misc. 691, 251 N. Y. S. 454; *People* v. *Seaman*, 174 Misc. 792, 21 N. Y. S. 2d 917; *People* v. *Singer*, 18 Abb. N. C. 96, 5 N. Y. Crim. 1.

Pennsylvania.[29] In these cases, however, the defendant not only answered the subpoena but also gave testimony before the grand jury, and it is therefore difficult to determine upon what basis the decisions were pitched.

Other states quite clearly hold that the privilege against self-incrimination does not include a right to refuse to attend and be sworn as a witness before the grand jury, even though the witness is a *de facto* defendant. Here we find California,[30] Connecticut,[31] Maine,[32] and New Mexico.[33] But, as noted above, even on the basis of the federal decisions which tend to support petitioner, and even in the states most strict in protecting a "*de facto* defendant," this petitioner would not be deemed such a *de facto* defendant.

B. A GRAND JURY IS NOT BARRED FROM CALLING A PERSON, WHOM IT BELIEVES TO HAVE RELEVANT INFORMATION MERELY BECAUSE HE APPEARS TO SOME DEGREE TO BE IMPLICATED IN A CRIME UNDER INVESTIGATION

On the present record, the broadest issue with respect to the powers of a grand jury to call witnesses presented is whether a grand jury may call as a witness a person from whom it desires information who it also has reason to believe may be implicated to some degree in the matter under investigation. To hold that a grand jury ought not to call such a person as

[29] *Commonwealth* v. *Gross*, 172 Pa. Super. 85; 92 A. 2d 251; *Commonwealth* v. *Bane*, 39 Pa. D. & C. 664; cf. *Commonwealth* v. *Klein*, 40 Pa. Super. 352.

[30] *Re Lemon*, 15 Cal. App. 2d 82, 59 P. 2d 213; *Re Hoertkorn*, 15 Cal. App. 2d 93, 59 P. 2d 218.

[31] *State* v. *Kemp*, 126 Conn. 60, 9 A. 2d 63.

[32] *Gendron* v. *Burnham*, 146 Me. 387, 82 A. 2d 773.

[33] *Territory* v. *Torres*, 16 N. M. 615, 121 Pac. 27.

a witness would severely limit the traditional function of grand juries in the federal courts and would be a disservice both to law enforcement and the rights of individuals suspected of crime.

1. It is not our purpose here to attempt to trace the history of the development of the grand jury as an institution of the common law. Nothing of importance could be added to what has been said elsewhere. *United States* v. *Smyth*, 104 F. Supp. 283, 288–290 (N. D. Cal.); Orfield, *Criminal Procedure from Arrest to Appeal* (1947), pp. 135–193; Edwards, *The Grand Jury* (1906), pp. 1–44. It is enough to say that the grand jury "is invested with broad investigatorial powers into what may be found to be offenses against federal criminal law." *United States* v. *Johnson*, 319 U. S. 503, 510. Armed with this inquisitorial authority, it is entitled to pursue matters called to its attention by the court which brought it into being, or submitted to it by the district attorney, or which came to the jurors' attention during the course of, and which are germane to, a situation under investigation or which constitute knowledge within the possession of one or more of the grand jurors. *Hale* v. *Henkel*, 201 U. S. 43. The essential nature of a grand jury proceeding was aptly described in *Blair* v. *United States*, 250 U. S. 273, 282, where it was said:

> It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been

> said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning. *Hendricks* v. *United States,* 223 U. S. 178, 184.

Certain conclusions naturally flow from the essential character of a grand jury. Its purpose is to inform itself and then accuse; it is not a trial body. It inquires and investigates, but it does not determine guilt or innocence. To that end, a grand jury is entitled to inquire upon what foundation a charge is made, not upon what ground it is denied. *Respublica* v. *Shaffer,* 1 Dall. 236. Its only function is to determine whether there is sufficient evidence to justify a trial. Orfield, *supra,* p. 144. True enough, many a case is turned over by the district attorney to the grand jury in such condition that there is no doubt as to the nature of the offense, the identity of the offender, and the probable sufficiency of the evidence, if unrebutted. But there are many other occasions—of which this grand jury proceeding is an example—where the scope of the inquiry is broad, where there are numerous possible future defendants, where there is only suspicion, however grave, as to the nature of the offense, and where even less is known as to the identity of the offenders. If a grand jury is to dig out the incriminatory facts in such a situation, it must concern itself with a number of individuals, and not be restricted to the conduct of any particular person. It is in precisely these circumstances that the full scope of the inquisitorial power must be utilized.

2. Investigation must always precede the stage where specific accusation is desirable and the power of investigation must be free from any restraint such as, or similar to, a showing of probable cause. Dession and Cohen, *The Inquisitional Functions of Grand Juries,* 41 Yale L. J. 687, 691. In federal criminal law, the grand jury has such power. *United States* v. *Johnson, supra,* 319 U. S. 503, 510. It is desirable that it should, particularly for cases such as this where the conduct of federal officials is involved. The grand jury system with its secret proceedings embodies many safeguards, not present to so great a degree in other forms of investigation.

First, a record is kept of grand jury proceedings so that possible abuse of the investigative function is subject to scrutiny. Second, the power is vested in a group, rather than an individual, which serves as a rein on arbitrary action. Third, the grand jury can compel witnesses to appear before it only by acting through the court which impaneled it, and, therefore, it is not entirely free to roam where it will. Fourth, grand juries have in the past, demonstrated a willingness to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will. *Hale* v. *Henkel,* 201 U. S. 43, 59; *Hoffman* v. *United States,* 341 U. S. 479, 485.

Since prosecutions must begin with an investigation, and since grand juries are the proper instrument to conduct investigations, good sense demands that the jury not be unduly hampered in the exercise of its functions. Its range must be wide, and its progress

must not be impeded unnecessarily. Narrowed to the terms of this issue, Halperin should be viewed as just another witness and hence subject to subpoena as such. The grand jury may suspect that a particular person will turn out to be a party to a conspiracy, or a principal offender in a crime under investigation; but he should be considered as a witness subject to process at least until the grand jury is reasonably certain that it will indict. Any other approach will impede the grand jury function. Any other ruling will lead to less and less use of the grand jury as an instrument of investigation and more use of private interrogation without all the safeguards discussed above.

For these reasons the government submits that it is in the interest, both of law enforcement and of individual suspects, to hold that a person in Halperin's position may properly be called as a witness before a grand jury, always of course with his right to claim the privilege against self-incrimination.

IV

PETITIONER HALPERIN, WHO SOUGHT OUT WITNESSES WHO DID NOT WISH TO CONSULT HIM AS AN ATTORNEY AND ADVISED THEM TO REMAIN SILENT WHEN THEY WISHED TO TELL THE TRUTH, WAS PROPERLY CONVICTED OF ENDEAVORING TO OBSTRUCT THE ADMINISTRATION OF JUSTICE

Petitioner Halperin,[34] by his question "whether a person may be convicted of corruptly influencing wit-

[34] Though each of counts 5, 6 and 7 named Grunewald, Bolich, Steinberg, Scherm, Halperin, Hoffman, Davis and Schopick as defendants, only petitioner Halperin has been convicted of them. Defendants Hoffman, Davis and Schopick were severed

nesses solely on proof that he advised a witness to plead the Fifth Amendment where the witness was justified in doing so, even though the plea would also serve the interests of the person giving the advice" (Halperin Pet. 24), attempts to interject into the case a spurious issue that has no foundation in fact. A brief review of the record will disclose that this issue is not properly before the Court at this time.

The indictment in counts 5, 6, and 7 (R. 14–16) charged violations of 18 U. S. C. 1503 and 18 U. S. C. 2. Count 5 charged that defendants

> * * * well knowing that a grand jury * * *, hereinafter referred to as the Brooklyn Grand Jury, was duly conducting an inquiry and investigation, and well knowing that Morton Marks had been subpoenaed by, and was about to be a witness before, said Brooklyn Grand Jury * * * did unlawfully, wilfully, knowingly and corruptly endeavor to influence, intimidate and impede said witness, and * * * to influence, obstruct and impede the due administration of justice * * * by counseling, requesting, advising and suggesting to said witness that he give fictitious, fradulent, false and manufactured testimony before said Brooklyn Grand Jury * * * and that he refuse to answer pertinent questions and refuse to tell the whole truth to said Brooklyn Grand Jury * * *.

Counts 6 and 7 were similarly worded, differing only in respect to the identity of the witness influenced (Berman and Tobias) and the date of the violation.

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from the trial of Halperin on these counts. The trial court dismissed these counts as to Grunewald, Bolich, Steinberg, and Scherm during the trial at the end of the government's case (R. 569).

The court charged the jury as follows (R. 745–746):

> If you can conclude, beyond a reasonable doubt, that Halperin, knowing that a proceeding was pending before the Grand Jury and that the person with whom he was communicating was a potential witness before the Grand Jury, urged him not to tell the truth before the Grand Jury, with a deliberate intent to impede the judicial proceedings, then you may convict the defendant Halperin on those counts. If, however, you cannot so conclude, or if you conclude that the only advice given by Halperin to these persons was to retain a lawyer, or to invoke their constitutional privilege of refusing to answer questions on the ground that the answers might tend to incriminate them, then you should acquit the defendant Halperin on Counts Six and Seven.

In view of this instruction, it is clear that the issue is not whether the verdict could rest on petitioner's advice to the witness as a lawyer to refuse to answer questions on the ground that the Fifth Amendment protected him. The verdict rested on a finding that petitioner intended to impede justice by influencing a witness not to tell the truth.

The evidence as to all three substantive counts, any one of which supports the concurrent sentences imposed, shows clearly that this petitioner Halperin was not convicted for advice he gave as a lawyer.

1. As to counts 6 and 7,[35] the evidence shows that early in 1952 Davis and Halperin went to see Tobias

[35] These counts charged corrupt endeavors to influence witnesses Tobias and Berman on March 13 and March 18, 1952 (R. 15–16).

at his office and told him that the newspaper accounts of the Pattullo case were a lot of fanfare and "that they had not spoken about the Gotham case and they were sure if everybody was silent that the whole thing would blow over in a short time" (R. 170).

In February, 1952, Halperin and Davis again met with Tobias at which time Davis said that if "anybody were to come to speak to Berman or myself [Tobias] to refer them to Davis as Berman's attorney" (R. 171). As to Halperin's part in this meeting, Tobias testified (R. 171):

> Halperin said that he had done Berman a very good turn in the handling of his own tax case and he certainly wanted to ask Berman not to hurt him by talking in connection with the tax case now.

About March 15, 1952 (the date charged in count 6), Halperin went to lunch with Berman and Tobias (R. 149). Berman testified that Halperin, after expressing the fear that he would be indicted, said he was going to stand on his constitutional rights and hoped that Berman would do the same (R. 149–150). Berman testified further (R. 150):

> He [Halperin] mentioned the fact that he had done me a good turn and that was the least I could do for him.

Halperin then advised Berman to engage an attorney (R. 150). Berman, on receiving a subpoena from the grand jury, engaged Mr. Kotler as counsel (R. 149, 162).

On March 18, 1952 (the date charged in count 7), Davis again met with Tobias and, after explaining

that the Pattullo Modes people had talked to the grand jury about the role Davis and Halperin had played in obtaining the decision not to prosecute them, said that he was afraid that the Gotham Beef case would come up for examination. Tobias testified that Davis then "asked Berman and myself to please not say anything" (R. 171). A day or so later Tobias met with Halperin and was again told that the Pattullo Modes people had testified. According to Tobias' testimony, Halperin said (R. 172):

> * * * that it was a terrible thing for them to have done, that he hopes that Berman wouldn't do the same thing to him because he had done Berman such a good turn; it would be a terrible thing. He said he had been in touch with the Washington associate and that he was going to stand silent, Halperin was going to stand silent and he hoped that Berman and I would likewise do the same thing.

At no time during the conversation between Tobias and Halperin did Halperin suggest that Tobias invoke the Fifth Amendment before the grand jury (R. 180–182).[36]

---

[36] Petitioner's counsel, during cross-examination of Tobias, in an apparent effort to establish that petitioner had merely urged Tobias to remain silent lest he give evidence that might tend to incriminate himself, was able to elicit only that petitioner, while not asking Tobias to lie, merely suggested this ground for silence. Tobias testified, "There were requests by Mr. Halperin that Berman and I do not talk, that it would be a bad thing for him and it would be a bad thing for Berman. He did not use any legal phraseology such as 'Stand on the Fifth Amendment or refuse to answer on constitutional grounds,' or anything like that. But he did say that he hoped that Berman and I would not discuss this case with authorities" (R. 181–182).

2. As to count 5, the evidence showed that Davis, on hearing that a grand jury had been empanelled in Brooklyn in February, 1952, met with Halperin, Schopick and Hoffman at which time they felt that the "clients" would claim their constitutional privilege and not give evidence if called before the grand jury as witnesses (R. 361). When a subpoena duces tecum was served on the Pattullo Modes Corporation to produce its books and records before the grand jury, Morton Marks, the secretary of the corporation and a stockholder therein (R. 17–18), notified Mr. Kostelanetz and Mr. Nahum Bernstein who were their "only lawyers at that time" (R. 44).[37] Marks testified that Davis "was eager to learn about any thing that Mr. Bernstein or Mr. Kostelanetz were going to advise us about" (R. 44). Ten days or two weeks after the service of the subpoena duces tecum on Pattullo Modes, Marks was subpoened to appear before the grand jury (R. 44). Davis, learning that Marks and Mrs. Segel were to meet with Mr. Kostelanetz on a Sunday in early March, 1952, called the latter to see if he should attend (R. 362). When Davis learned he was not wanted at the meeting, he immediately contacted Halperin, Hoffman and Schopick and told them that he "felt that they were going their own way, their separate ways" (R. 362). Halperin, Hoffman and Schopick told Davis that he

[37] Mrs. Marjorie Segel, a stockholder in Pattullo Modes, testified (R. 114):

"* * * we had retained Mr. Kostelanetz, so that we weren't taking advice from Mr. Davis at this point. We just used to talk to him to really try and find out what he thought was going on."

"should nevertheless try to communicate with Mr. Marks" (R. 362). Davis then testified (R. 362):

> * * * the following day, on a Monday, I believe, I called Mr. Marks and wasn't able to speak to him immediately, but I finally did get him, and he consented to see me, and Mr. Schopick and I went over to the office of Patullo Modes and there we saw Mr. Marks, and said, "How did it happen that you had this meeting without me?"
>
> He says, "We have decided to cooperate with the Government."

Davis fixed the date of this meeting with Marks as approximately March 8 or 9, 1952 (R. 363).

Marks, testifying for the government, described the meeting as follows (R. 45):

> * * * I avoided him for several days, wouldn't take any telephone calls. He finally came up to see me at our office. I saw him alone—him and Mr. Shopick alone. He said, "Morton, what are you going to do? Why are you avoiding me? Are you going to talk?"
>
> I said, "I am going to do what my counsel advises us."
>
> He said, "Well, you can't talk. You would be crazy to talk. If Mr. Kostelanetz told you to do that he is crazy. I will get you any lawyer you want, put it up to him; put it up to this lawyer and if he tells you to do anything that Mr. Kostelanetz does, you can do it, but please take my offer to see another lawyer. Mr. Kostelanetz is crazy to do a thing like that, to advise you to do that."
>
> I told him I wasn't going to see anybody else, that we were going to take Mr. Kostelanetz's advice.

He said, "Morton, are you going to turn me in?"

My answer was that I was going to take the advice of our attorney, and he and Mr. Schopick left.

On this record, the court below was correct in stating (Vol. V, App. p. 315) "it is nothing short of fantastic to suggest that this is no more than legitimate advice by a lawyer to a client, for the client's own protection". The witnesses did not come to Halperin (or, as to count 5, to Davis acting in agreement with Halperin) for advice. The lawyers sought them out, and not for the purpose of advising clients in the client's interest. The lawyers sought them out for the express purpose of influencing the course of action which their former clients would take as witnesses before the grand jury. The intent was, regardless of the interest of the witnesses, to obstruct the administration of justice.

Petitioner pins his argument on the statement in the opinion below that "It is immaterial that Halperin did not ask these witnesses to tell deliberate falsehoods." The whole tenor of the conversations "* * * was that of impeding justice and maintaining secrecy with respect to the operations of the conspirators" (Halperin Br. 40–45). In other words, the argument is that, although he deliberately and intentionally tried to keep the witnesses from telling the whole truth to the grand jury, when the witnesses wished to tell the truth, Halperin is nevertheless not guilty of impeding justice because the means of obstruction which he suggested had the appearance of legitimacy. The use of a legitimate facade does

not protect acts deliberately designed to bring about an unlawful result.

This Court has recognized that this statute, which protects the foundations of our judicial system, must be given a broad construction. In *United States* v. *Russell*, 255 U. S. 138, an experimental approach to a juror through his wife to discover whether the juror would be receptive was held to be an "endeavor" within the meaning of a prior and substantially identical statute. See also *Sinclair* v. *United States*, 279 U. S. 749, 764, holding that the shadowing of jurors, although unknown to them, was a contempt because it "tended to obstruct the honest and fair administration of justice." In *United States* v. *Polakoff*, 121 F. 2d 333, 334 (C. A. 2), certiorari denied, 314 U. S. 626, the court held that there was a corrupt endeavor to obstruct justice where a person, for supposedly disinterested reasons, but actually in expectation of financial gain, tried to persuade a United States Attorney to recommend a light sentence. The holding rejected the argument (p. 333) that a corrupt endeavor to influence a court official requires an attempted debauching of that official, and not merely a use of otherwise legitimate arguments for concealed or falsified ends.[38]

[38] The Second Circuit in the *Polakoff* decision limited its prior ruling in *Rosner* v. *United States*, 10 F. 2d 675, cited by petitioner (Halperin Br. 44), to the special fact that there the advice by the defendant to a witness was to disregard a letter. It noted that "since a mere request by the prosecutor that an accused appear could be disregarded as not compulsory process, advice to that end was not illegal." (121 F. 2d at p. 335, see also *United States* v. *Polakoff*, 112 F. 2d 888 (C. A. 2), certiorari denied, 311 U. S. 653).

The motive of a witness exercising his legitimate claim of privilege may be immaterial, as petitioner argues. But the motive of one who tries to keep a witness from testifying when the witness, upon the advice of counsel, has decided to tell the truth is manifestly material in relation to obstruction of justice. The intent with which an act is done in many situations makes the difference between criminality and lack of criminality. *Morissette* v. *United States*, 342 U. S. 246; *Screws* v. *United States*, 325 U. S. 91, 104–105. Thus, the use of a legal contract with intent to defraud is a crime under the mail fraud statute, although use of the same contract with honest intent may be lawful. *Miller* v. *United States*, 133 Fed. 337, 342 (C. A. 8). Perjury may be established by showing that the witness did not believe that the statement which he made under oath was true. *United States* v. *Remington*, 191 F. 2d 246, 248 (C. A. 2), certiorari denied, 343 U. S. 907; *Regina* v. *Schlesinger*, 10 Q. B. 670, 2 Cox. Cr. Cases 200 (1847); *People* v. *McKinney*, 3 Park. Crim. Rep. (N. Y.) 510, 515 (1857).

Under this statute, where the attempt to obstruct justice, the "endeavor", is itself the crime, the intent with which the approach to the witness was made is manifestly controlling. Halperin intended to keep the witnesses from telling the truth before the grand jury; he intended to impede the process of the grand jury. He was therefore properly convicted of an attempt to obstruct the administration of justice.[39]

[39] For the reasons developed above, we believe that the case of *United States* v. *Herron*, 28 F. 2d 122 (N. D. Cal.), relied upon by petitioner (Halperin Br. 42), was wrongly decided. It is in any event distinguishable. There, some defendants on

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below should be affirmed.

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Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
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BEATRICE ROSENBERG,
Attorney.

MARCH 1957.

---

trial advised a witness to consult a lawyer and plead the Fifth Amendment, and the defendant's lawyer advised the witness to do so. Since the indictment charged that the lawyer gave the advice, not in the interests of his client, but with intent to benefit the others, we think it charged an offense. But since the lawyer gave the advice to one consulting him as such, it is very different from this case where the witnesses did not wish to consult, indeed sought to avoid petitioner, and petitioner or his co-conspirator sought them out.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 184

MAX HALPERIN,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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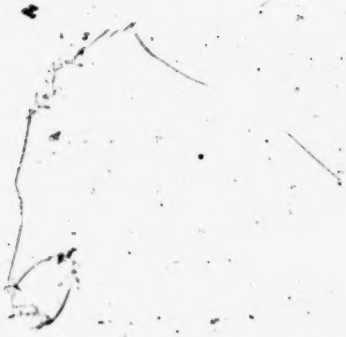
HARRY SILVER,
With him on the petition.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. .....

MAX HALPERIN,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioner, Max Halperin, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case.

Opinions Below.

There was no opinion in the District Court. The prevailing and dissenting opinions in the Court of Appeals have not yet been officially reported. The prevailing opinion is printed in Vol. V appendix at pages 288a to 316a. The dissenting opinion of Judge Frank is printed in Vol. V appendix at pages 316a to 357a. Petitioner's application for rehearing was denied without opinion by the majority. Judge Frank dissented in an opinion not yet officially reported. It is printed in Vol. V appendix at pages 380a to 393a.

Statement of Jurisdiction.

The Court of Appeals herein affirmed the conviction of the petitioner by a divided court by judgment dated and entered on April 10, 1956, the majority consisted of Judges Medina and Hincks. Judge Frank voted to reverse petitioner's conviction and to grant him a new trial.

Petitioner duly filed for rehearing, which was denied by order dated and entered on June 1, 1956, Judge Frank dissenting. This petition is filed within thirty days thereafter.

The mandate of the Court of Appeals herein has been stayed by the Court of Appeals pending application for certiorari, pursuant to its Rule 28(c).

The jurisdiction of this Court is invoked under Section 1254 of Title 28, United States Code, and Rule 37(c) of the Rules of Criminal Procedure.

Questions Presented.

1. When a defendant testifies in his own defense at his trial, and his answers to questions show that, although averring his innocence, he was justified in invoking the Fifth Amendment with regard to like questions before a Grand Jury—as in this case all agree—is not that defendant denied due process when the Government on cross-examination brings out before the trial jury, the fact that he refused to answer the questions before the Grand Jury, upon such constitutional grounds?

2. When a defendant has been subpoenaed to testify before a Grand Jury in an investigation, of which he is a primary target, has claimed his Constitutional privilege, advised the Grand Jury that he was doing so as an innocent man ensnared in suspicious circumstances and because he

could not cross-examine or be represented by counsel, may the trial court charge the jury that they may consider his refusal to testify before the Grand Jury on the score of his credibility, although his trial testimony was entirely consistent with his position before the Grand Jury?

3. Under the circumstances surrounding a defendant's appearance before a Grand Jury as set forth in the last preceding paragraph, does not the Court's instruction as aforesaid illegally impeach and impede the defendant's statutory right to be a witness on his own behalf?

4. Does the rationale of *Raffel* v. *United States*, 271 U. S. 244, apply to prior invocation of the Fifth Amendment before a Grand Jury as distinguished from such action at a prior trial?

5. Does not the doctrine and rationale of *Slochower* v. *Board of Higher Education*, decided by this Court April 9, 1956, compel the conclusion that a defendant under the circumstances aforesaid, is denied due process of law when he is examined by the Government and compelled to admit that he refused to answer questions before the Grand Jury, and the Trial Court advises the jury they may consider that refusal on the subject of his credibility?

6. Is not a defendant, particularly one who asserted that he was invoking the Fifth Amendment as an innocent man being plotted against and beset by suspicious circumstances entitled to have the jury charged, "An innocent man may honestly claim his answers may tend to incriminate him"?

7. Does it constitute due process to subpoena a person to testify before a Grand Jury in an investigation of which he is a primary target, and thereby permit an examination before trial of a *de facto* defendant?

8. Does not the opinion of the Court of Appeals that the statute of limitations against conspiracy was not tolled, in that certain overt acts of concealment when committed were chargeable to the original conspiracy disregard and deny effect to this Court's views on proof of subsidiary concealment conspiracies, as set forth in *Krulewitch* v. *United States*, 336 U. S. 440, and *Lutwak* v. *United States*, 344 U. S. 604?

9. Does not the conclusion of the Court of Appeals herein that a single conspiracy rather than a multiplicity of conspiracies are disclosed by the record, run counter to this Court's decision in *Kotteakos* v. *United States*, 328 U. S. 750?

10. Does not the record disclose that the testimony of one characterizable as the chief architect of the alleged conspiracy was improperly bolstered by proof of his hypothetical prior consistent statements at a time when he had the same motives to prevaricate as at the trial, and does not the conclusion of the Court of Appeals that such evidence of prior consistent statement was admissible constitute a potentially harmful precedent in the administration of criminal justice in the federal courts?

11. Does a lawyer who advises a witness to plead the Fifth Amendment where the witness is justified in doing so become guilty of corruptly endeavoring to influence the witness merely because the interposition of the Constitutional privilege might also serve to protect the person giving the advice?

Constitutional Provision and Statutes Involved.

The constitutional and statutory provisions involved are, Fifth Amendment, 18 U. S. C. 371, 18 U. S. C. 3282, 18 U. S. C. 1503 and 18 U. S. C. 3481. They are printed in appendix A, infra.

Statement of the Case.

The indictment containing seven counts was filed on October 25, 1954, against petitioner Max Halperin, Henry W. Grunewald, Daniel A. Bolich and others:[1] in Count 1 all defendants are charged with conspiracy to defraud the United States in the exercise of its governmental functions of administering the internal revenue laws, and to conceal the acts of the conspirators, in violation of the general conspiracy statute, 18 U. S. C., Section 371; in Counts 5, 6 and 7 petitioner Halperin and others are charged with having corruptly endeavored to influence witnesses before the Grand Jury in the Eastern District of New York in violation of 18 U. S. C., Section 1503. The conspiracy is alleged to have been in operation from January 1, 1946 to the return date of the indictment; and the activities of Halperin, charged in Counts 5, 6 and 7, are alleged to have taken place in March, 1952. Counts 3 and 4 were dismissed and are not involved on this petition.[2]

Although the Court of Appeals unanimously affirmed the convictions of Grunewald and Bolich, Judge Frank filed a dissenting opinion as to the petitioner Halperin, holding that his Constitutional rights were violated, by the government's cross-examination at the trial, disclosing the fact that he had claimed his Constitutional privilege

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[1] Grunewald and Bolich are also proceeding in this Court by separate petitions for certiorari.

[2] Count 2 of the indictment was against Bolich, Sternberg and Scherm as employees of the Bureau of Internal Revenue. Steinberg and Scherm were acquitted, Bolich was convicted. Davis, Schopick and Hoffman were named as defendants, but the case as to them was severed. Petitioner Halperin was sentenced to five years imprisonment and $5,000 fine on count 1, and two years imprisonment and $1,000 fine on each of counts 5, 6 and 7, prison sentences to run concurrently.

Grunewald was convicted of conspiracy under Count 1, but the Court acquitted him under Counts 5, 6 and 7 (583).

before the Grand Jury. Judge Frank again dissented from the majority ruling denying a re-hearing to the aforesaid defendants, this time extending his dissent to the Statute of Limitations' point, and holding that the conviction of all of the defendants was barred by the Statute of Limitations.

The charges in the indictment arose out of the administrative disposition of two alleged tax evasion cases which were being investigated by the Internal Revenue Bureau. One was known as the Pattullo Modes case and the other as the Gotham Beef case. Both concerns were represented by the New York law firm of Schopick & Davis (303, 317-318).[3] Petitioner Halperin, a practicing attorney for forty-five years (616), now in his 72nd year (615), had shared office space with the firm at the time in question (617-619).

According to the testimony of Davis, who was the government's chief witness, he had suggested to Halperin that Halperin contact Grunewald in Washington to get help in the Pattullo Modes case, and that Halperin, after some negotiation, told him that Grunewald had agreed to accept $100,000 (328-330). Thereafter, on January 5, 1949, Bolich, then Assistant Commissioner of Internal Revenue, told the Agent in charge of the Pattullo Modes case to close out the Pattullo Modes case on a non-prosecution basis (475-476). This decision was announced to the taxpayers on January 10, 1949 (445, 477-478).

The object of the Pattullo Modes transaction was expressed by its principal Marks, named as co-conspirator, but not indicted, as follows:

> "He [Davis] says all he could promise was that there would be a memorandum put into our file that the case was to be settled on a civil basis" (36).

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[3] References are to pages in Grunewald-Halperin appendices in

In the Gotham Beef case, according to the government's proof, $60,000 was put in escrow by the principals therein (168, 326) and on October 28, 1948, they were told that the case was closed without criminal prosecution (284).

The object of this transaction was expressed by the Gotham Beef principal Tobias, also named as a co-conspirator, but not indicted, as follows:

> "Now, the exact terms of the escrow • • • was • • • that until I were to have heard with my own ears from the Special Agent's office from a responsible official that there was to be no criminal prosecution in the Gotham matter • • • the money was not to be released" (167).

Petitioner, Halperin, a lawyer, now over 71 years of age, was the only one of the three convicted defendants who testified in his own behalf. His testimony on direct showed his professional association with several alleged co-conspirators, and his acquaintanceship with others, and professional employment in connection with the tax matters (620-686). Halperin strongly protested his innocence. His narration of the extent of his participation in the tax matters being entirely exoneratory in tenor (Pattullo Modes, 621-623, 629, 630, 635, 636, 641-646; Gotham Beef, 667-670-675).[4]

Thereupon, the Government was permitted to elicit from Halperin, and bring to the conspicuous notice of the jury upon cross-examination, over objection and exception (695, 705), that Halperin had invoked the Fifth Amendment before a Grand Jury in response to questions relating to the aforesaid associations and dealings (694-708) despite the fact that both the majority opinion and the dissenting

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[4] Judge Frank, commenting upon the evidence, wrote (Vol. V appendix page 329a):

> "The evidence against Halperin is not overwhelming. The jury could have reasonably acquitted him."

opinion in the Court of Appeals acknowledge that Halperin was justified in claiming his Constitutional privilege upon the record (Vol. V—Appendix pages 311a, 317a).[5]

On re-direct, it was shown by reference to the Grand Jury minutes, that Halperin informed the Grand Jury that he was an innocent man and that he was invoking the Fifth Amendment (719, 720), because he had no right to cross-examine witnesses against him in Grand Jury proceedings (722). Halperin also advised the Grand Jury that he was acting on advice of counsel (719, 721). Halperin, it must be noted further, was a target of the Grand Jury investigation (709, 710).

Thus, it was affirmatively, and indeed, conclusively shown that no inconsistency existed between Halperin's course of conduct before the Grand Jury and at the trial. Nevertheless, in this case, in which all that could stand between Halperin and conviction was his credibility, the Trial Court authorized the jury to reject his testimony on the ground that he had asserted his Constitutional privilege before the Grand Jury (768; Exception 777).

Moreover, the Trial Court denied the request to charge "An innocent man may honestly claim that his answers may tend to incriminate him" (798, 728, 729).

The only overt acts shown to have been committed within three years of the filing of the indictment, related only to acts of concealment. Hence, prosecution was barred under 18 U. S. C., Section 328—all agree—Prevailing Opinion (Vol. V—Appendix p. 310a), Dissenting Opinion, (Vol. V—Appendix pp. 385a, 386a), unless there existed an endlessly surviving conspiracy to conceal as part of the original conspiracy.

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[5] Judge Frank wrote "No one doubts he then properly asserted the privilege" (Vol. V appendix, 317a).

After the credibility of the co-conspirator Davis (as to whom trial had been severed) who was the Government's principal witness, had been subjected to devastating attack, the Government on re-direct attempted to rehabilitate him by eliciting from him over objection and exception (395-407) that on or about the time of a Grand Jury investigation into the subject matter of this prosecution, and pursuant to a proposal by the witness that he would cooperate with the Government in its case against the appellants herein (395, 398, 399), Davis had made, through an attorney, a hypothetical statement consistent with his trial testimony. This testimony was admitted despite the fact that Davis' motive to fabricate at that time coincided with his motive to fabricate at the trial.

In February 1952 a grand jury was empaneled to investigate administration of the Internal Revenue Laws and their enforcement. The evidence in support of the charge in Counts 6 and 7 that Halperin attempted to corruptly influence Berman and Tobias, Gotham Beef principals, as prospective witnesses, shows however that Halperin merely advised them to plead the Fifth Amendment after learning from Berman for the first time that $60,000 had been put up by them in escrow in connection with their tax case (682).

Under Count 5, there was no evidence that Halperin himself had spoken to the Pattullo Modes principals concerning his role as a grand jury witness. The evidence did not support conviction in consequence of Davis' conversation with Marks since all that had been discussed by Halperin with Davis was speculation as to whether his clients would claim their Constitutional privilege before the grand jury (367, 368).

ARGUMENT.

I.

(Questions Presented 1-7.)

(A) Elicitation from appellant Halperin that he had invoked the Fifth Amendment before the Grand Jury, as a calculated feature of cross-examination by the Government at his trial; (B) the Court's charge that his claim of Constitutional privilege might discredit his trial testimony; and (C) the Court's refusal to charge that "an innocent man may honestly claim that his answers may tend to incriminate him.", derogated the Fifth Amendment and constituted a denial of due process at the trial, invalidating his conviction.[6]

In view of the fact that petitioner was justified upon the record in refusing to answer questions before the Grand Jury under the Fifth Amendment, as indeed the prevailing and the minority opinions in the Court of Appeals (Vol. V—Appendix pp. 311a, 317a), and the Trial Court (768) agree, it follows that the moment the Government launched upon the project of exposing Halperin's claim of Constitutional privilege on his cross-examination before the trial jury, he was denied due process by being arbitrarily penalized for having taken advantage of his Constitutional right.

The penalty resulting from the jury's inevitable prejudice against a person refusing to incriminate himself, follows from the popular conception that the Constitutional amendment was intended only for the protection of the

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[6] Phases of this point were the subject of Judge Frank's dissent from the prevailing opinion affirming Halperin's conviction.

guilty,[7] was intensified and given judicial direction when the Trial Court charged the jury in effect that they might disbelieve Halperin's testimony and convict him in consequence of his having invoked the Fifth Amendment before the Grand Jury (768).[8]

There can be no doubt that given the acknowledged circumstance that Halperin was justified in claiming his Constitutional privilege, that under the doctrine of *Slochower* v. *Board of Higher Education* (100 L. Ed. Adv. Rep. No. 11, p. 449), decided by this Court on April 9, 1956, Halperin was being denied due process, by being arbitrarily penalized for having invoked the Fifth Amendment.

In the *Slochower* case, this Court wrote (at p. 454, *supra*):

> "At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. The right of an accused person to refuse to testify, which had been in England merely a rule of evidence, was so important to our forefathers that they raised it to the dignity of a constitutional enactment, and it has been recognized as 'one of the most valuable prerogatives of the citizen'. *Brown* v. *Walker*, 161 U. S. 591, 610, 40 L. ed. 819, 825, 16 S. Ct. 644. We have reaffirmed our faith in this principle recently in *Quinn* v. *United States*, 349 U. S. 155, 99

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[7] As stated by Professor Ralph S. Brown, Jr., a Professor of Law at Yale Law School, in 40 American Bar Association Journal, 404, 406, May, 1954:

> "What does the public know about the Fifth Amendment anyway? It is told in every headline on the authority of prominent legislators, that silence means guilt."

[8] The Trial Court instructed the jury: "However it was proper for the Government to question the defendant with respect to his previous invocation of the Fifth Amendment, but you may consider this evidence of his prior assertions of the Fifth Amendment only for the purpose of ascertaining the weight you choose to give to his present testimony with respect to the same matters upon which he previously asserted his Constitutional privilege" (768).

L. ed. 964; 75 S. Ct. 668. In *Ullmann* v. *United States*, —U. S.— (100 L. ed. Advance p. 361, 76 S. Ct.—), decided last month, we scored the assumption that those who claim this privilege are either criminals or perjurers. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury.

As we pointed out in Ullmann, a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstance. See Griswold, the Fifth Amendment Today (1955)."

* * * * * * *

(p. 455) "In practical effect the questions asked are taken as confessed and made the basis of the discharge. No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege. It matters not whether the plea resulted from mistake, inadvertence or legal advice, conscientiously given, whether wisely or unwisely.

* * * * * * *

Since no inference of guilt was possible from the claim before the Federal committee, the discharge falls of its own weight as wholly without support. There has not been the 'protection of the individual Mr. Justice Cardozo characterized as the very essence of due process.' *Ohio Bell Telephone Co.* v. *Commission*, 301 U. S. 292, 302, 81 L. ed. 1093, 57 S. Ct. 724."

If the record disclosed that Halperin's testimony at his trial indicated that Halperin was perjuring himself when he had claimed his testimony would tend to incriminate and that in fact he was not ensnared in suspicion raising circum-

stances, it might be that the discrepancy might have been the subject of cross examination without denial of due process. This, however, was conspicuously not the case. His justification to refuse to answer before the Grand Jury is conceded.. He was entitled to invoke the Fifth Amendment.

This result was appreciated by the Court in *Masterson* v. *Transit Co.*, 204 Mo. 507, 524, 525, which wrote:

> "The right of the motorman to refuse to testify under the circumstances stated was a personal right of such high importance that it is expressly guarded in the Constitution itself. It is there given absolutely and unequivocally, yet we are now asked to declare that it is a right which the citizen will exercise at his peril, the peril of being branded with suspicion, the peril of having it brought up against him to impeach himself if he should ever assert his innocence. Such a ruling would be a gross impairment of the constitutional right;"

It is respectfully submitted that the *Masterson* case view coincides with the recent decisions of this Court culminating in the *Slochower* decision.

There is no more firmly established rule in the field of evidence than that which requires that only when inconsistency has been shown may former conduct be weighed against the witness' credibility (3 Wigmore on Evidence, Page 725, Section 1040).

It is interesting to note that in *Commonwealth* v. *Smith*, 163 Mass. 411, 432, the Court in approving the right to cross examine a witness regarding a prior claim of refusal to answer on the ground of self-incrimination, found it necessary first to search for and purport to find the element of inconsistency. Thus concerning the nature of the Constitutional privilege, as intended only for the guilty, the Court noted:

> "The defendant in such case now says he is innocent. He formerly did not say he was innocent, but that he would not answer lest he might incriminate himself."

In our case, even this misconceived inconsistency did not exist. Halperin did formerly say he was innocent and his testimony shows moreover that his innocence, as noted in the *Slochower* case, was of a nature beset by circumstances of guilt which justified this action.

The Massachusetts Court erred in failing to recognize that innocence and self-incrimination are not mutually exclusive but may readily co-exist, but within the framework of the Court's mistaken view, the fact remains the Court appreciated it must be able to pinpoint an inconsistency before it could hold the witness' credibility may be deemed impoached by the jury.

The case of *Raffel* v. *United States*, 271 U. S. 494 is not to the contrary, and in any event, it has been reversed in principle by the recent trend of this Court's decisions culminating in the *Slochower* case. On these phases, the Court is urgently, respectfully referred to the dissenting opinion of Judge Frank (Vol. V—Appendix pp. 317a-330a) manifestly written before this Court's decision.[9]

The Trial Court compounded the prejudicial effect of this instruction authorizing petitioner's conviction via the destruction of his credibility because of his invocation of of the Fifth Amendment by refusing to charge as requested that "An innocent man may honestly claim that his answers may tend to incriminate him" (798, 728, 729), especially in view of the Court's attitude toward Halperin's claim

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[9] The appeal herein was argued in the Court of Appeals on November 15, 16, 1955. Its decision was announced April 10, 1956. The *Slochower* case decision became public on April 9, 1956.

of constitutional privilege, as exemplified by his remarks in the course of trial.[10]

The prevailing opinion overlooked the vital difference between the requested charge and that given (768): the requested charge would have served to correct the jury's misconceptions that an innocent man can not claim to be incriminated by his answers, and thus have explained to the jury why Halperin's action before the Grand Jury was irrelevant to the issues. The charge as given merely arbitrarily directed the jury to disregard what they undoubtedly deemed an important relevant fact.

For discussion in another context of the futility of admonishing a jury to disregard what it may deem impor-

[10] While Halperin was being cross examined, the Court interpreted the Constitutional privilege in such fashion as to literally destroy the defendant Halperin's credibility. The Court said (697) "I know the Government's position. As I see it, Mr. Corbin, no witness can be compelled to testify against himself. The witness is called before the grand jury and the answer was, I refuse to answer something on the ground that if I answer that question *it will incriminate me*. Mr. Corbin: Tend to incriminate. The Court: Or tend to incriminate. * * *."

The Court went further and said (703). "The Court: Would an answer to that question have incriminated you or tend to incriminate you?" Upon objection, it was withdrawn. Again, at page 705, Mr. Halperin was still being examined with respect to his claim of privilege before the Grand Jury. The Court asked (705) "And you say the answers given were true?", to which again objection was taken, and the Court went on to say "The witness says he testified before the Grand Jury. I want to find out, when he says the question is there and the answer is there, whether he is also conceding that he was sworn to tell the truth and it was a truthful answer; not that it is merely in the minutes, but that that is the sworn testimony."

Counsel objected that it was an implication by the Court that the witness was lying. The Court again replied that he was not implying "that it was untrue."; that all he wanted to find out was that the defendant was not merely admitting that it was in the minutes, but that it was sworn testimony.

During the exchange motion for a mistrial and the withdrawal of a juror was made, it was denied and an exception taken (704).

It is, thus, obvious that with the leverage of Halperin's claim of privilege, the Court destroyed his credibility before the jury and the charge was even less than lip service to the rule.

tant, relevant facts, mistakenly or otherwise, see Dissenting Opinion below and Appendix thereto (Vol. V—appendix pp. 320a, 331a, 340a). Of course, an expository instruction showing the facts to be *irrelevant* is an entirely different matter and not subject to the charge of psychological futility.

Militating further to remove the Trial Court's rulings on the subject of the Fifth Amendment from conformity to the essential dictates of "appropriate judicial guidance" (*Bollenbach* v. *United States*, 326 U. S. 607, 6[illegible]), is the fact that petitioner Halperin was the target of the Grand Jury investigation (709, 710, not contested by Government). He was a "*de facto* accused" in the language of *United States* v. *Scully*, 2 Cir., 225 F. 2d 113. He should not have been called before the Grand Jury at all, since by doing so, the Government was seeking an unsanctioned examination before trial. In the *Scully* case, the Court wrote at page 116 of 225 F. 2d:

> "Indeed, one would suppose that, as a matter of ethics or fair play or policy, a prosecutor would in all cases refrain from calling as a witness before a Grand Jury any person who is *de jure* or *de facto* an accused. The absence of appeals to this court involving the problem under discussion would seem to indicate that some such rule or practice is observed in the prosecutors' offices in this circuit."

Compare *United States* v. *Minker*, 100 L. Ed. Adv. Rep. No. 6, pages 192, 203, decided by this Court on January 16, 1956.

This Court once granted certiorari apparently upon this point, but the appeal was not prosecuted (*O'Connell* v. *United States*, 2 Cir., 40 F. 2d 201, decided by a divided court, certiorari granted 281 U. S. 716, dismissed years later under Rule 35, 296 U. S. 667.

Still another aspect of the multiple error implicit in the Court's rulings arises from the fact that a defendant has a statutory right to testify, no less than a right not to testify.

In *United States* v. *Modern Reed & Rattan Co.*, 159 F. 2d 656, 658, the Court noted, that the Government in a criminal case had no right to prejudice the defendant's election of whether or not he should take the stand in his own behalf. In the interest of the full development of the facts at a criminal trial, it would appear that a defendant's right to testify (18 U. S. C. 3481) should be safeguarded, no less than his right not to testify, and should not be prejudiced in advance.

In conclusion, it need only be noted that the error herein involving as it does, constitutional and statutory considerations, as well as appropriate judicial guidance to juries cannot be deemed merely technical.

Bruno v. *United States*, 308 U. S. 287, *supra*;
Bollenbach v. *United States*, 326 U. S. 607, *supra*;
DISSENTING OPINION, Vol. V, appendix p. 329a.

II.

(Questions Presented 8, 9.)

The Court of Appeals erred in holding that the Statute of Limitations did not bar prosecution of Halperin on the conspiracy charge (Count One).

On this aspect of the case, not only did Judge Frank dissent on the application for rehearing and vote to grant all of the convicted defendants a new trial, but the prevailing opinion commented: "This is an interesting and important question, seemingly one of first impression" (Vol. V, appendix p. 299a).

Consideration of this contention is facilitated and focalized by a passage in the Trial Court's instructions to the jury supplemented by a concession made by the Government.

The Trial Court charged that the Statute of Limitations barred conviction of the defendants upon the First Count unless an overt act was committed within three years prior to the date of the indictment, that the indictment alleged that the conspiracy comprehended within it, a conspiracy to conceal the true facts from investigation should investigation thereafter eventuate, and that to convict the jury must determine that the conspiracy did indeed comprehend a conspiracy to conceal and that an overt act to carry out such purpose occurred within the three year period (750).

This aspect of the Court's charge dovetailed with the Government's concession, made in the course of argument upon defendants' motions to dismiss at the end of the Government's case, that no overt acts other than concealment had occurred within the three year period prior to the date of the indictment (578).

The separate conspiracies in our case, having specific objectives, terminated when the objectives were accomplished. Thus, the Pattullo Modes criminal prosecution conspiracy allegedly involving Halperin, Grunewald and Bolich, terminated when word of no-prosecution was communicated to the Pattullo principals in January, 1949 (36, 41, 76, 228-232, 335). The Gotham Beef conspiracy likewise terminated when the decision of no-prosecution was received by the Gotham principals in October, 1948 (149, 150, 155, 167, 187, 328). These two account for the mainstream of the Government's proof, and in view of the direct evidence in the case, the date of termination of the conspiracy can be set with chronological accuracy.

The direct evidence in our case with its verbatim context of separate conspiracies precludes resort to inferences[11] to spell out a single conspiracy.

Conspiracies are deemed terminated when their objective is accomplished and this accomplishment of objective and end of conspiracy can be pinpointed, in our case, as to time and place. (*Krulewitch* v. *United States*, 336 U. S. 440, 442, 443; *Lutwak* v. *United States*, 344 U. S. 604, 616, 617; *People* v. *McQuade*, 110 N. Y. 284, 308 (bribery conspiracy accomplished—not continued by co-defendant's alleged subordination of perjury at senate committee hearing); *United States* v. *Irvine*, 98 U. S. 450, cited in *Fiswick* v. *United States*, 329 U. S. 211, 216.)

In our case, it is clear, that the various conspiracies, or any conspiracy cognizable under the First Count of the indictment had terminated more than three years prior to the date of the indictment herein.

Any conspiracy with regard to dissuading the Pattullo Modes or Gotham Beef taxpayers from giving testimony before the Grand Jury or to dissuade them from speaking to Congressional Committee investigators, upon the record, had its genesis after the conclusion of the Pattullo Modes and the Gotham Beef conspiracies. (See Dissenting Opinion, on Petition for Rehearing, Vol. V, appendix p. 389a). There is no evidence that before the termination date of either of these conspiracies, it was ever an object of the conspirators to dissuade the Pattullo Modes or Gotham Beef taxpayers from answering questions of the Congressional Committee investigators or from testifying before the Grand Jury. Indeed, there could not have been, for neither the Congressional Committee nor the Grand Jury were then in existence or even projected.

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[11] *Guaranty Trust Co.* v. *Minneapolis & St. Louis R. R. Co.*, 8 Cir., 36 F. 2d 747, 757; *Consumers Power Co.* v. *Nash*, 6 Cir., 747, 757; 20 *Amer. Jur.* 163.

The Government's contention, that a subsidiary conspiracy to conceal survived the central criminal tax fraud objectives, is simply a re-statement of the Government's contentions, made and rejected in *Krulewitch* v. *United States*, 326 U. S. 440, 443, and *Lutwak* v. *United States*, 344 U. S. 604, 616.

The position of petitioner Halperin, and indeed that of the other convicted defendants, Grunewald and Bolich, has been that the alleged conspiracy herein terminated in 1949 when the taxpayers received administrative assurance of no criminal prosecution. In support of this position we have quoted the very words of the respective taxpayers concerning the tenor of their understanding of the alleged conspiracy (see, *supra*, pp. 6, 7).

Although Judge Frank, in his dissenting opinion upon the petition for rehearing does not entirely accept this contention and perceives in the evidence the possibility that the conspiracy herein encompassed the purpose of preventing prosecution of the taxpayers for tax evasion, subsequent to the no criminal prosecution administrative accomplishment, in 1949, Judge Frank nevertheless acknowledges that the jury "may well have found—and, for all we know did find—that the conspiracy ended in 1949, since the jury may have found that it was not a purpose of the conspiracy to prevent prosecution of the taxpayers for tax evasion after that date" (Vol. V, Appendix p. 388a).

Assuming that the jury did so find, Judge Frank proceeds to accept petitioner Halperin's contentions, in the following language (Vol. V, Appendix p. 389a):

> "Even so, such an overt agreement to conceal, made after 1949, could not reasonably serve to prove that the conspiracy, if it otherwise ended in 1949, had, before 1949, included an agreement—other than by implication from the mere existence of the con-

spiracy—to conceal the conspiracy after 1949. It could serve, at most, to prove a new conspiracy to conceal an older conspiracy. In that event (although such a new conspiracy would be evidence of the older conspiracy) the defendants could not, on such evidence, be convicted of the older conspiracy which ended in 1949, since the statute of limitations would have run against the older three years after 1949. See *U. S.* v. *Siebricht,* 59 F. 2d 976, 978 (C. A. 2) to the effect that an old conspiracy "could not be revived by the breath of a new and different conspiracy * * *" The defendants were not indicted for such a new conspiracy, and the judge's charge precluded a conviction based thereon.[7] See, e. g., *U. S.* v. *Siebricht, supra.*

It follows that, if (1) the jury found—as it may have—that the conspiracy ended in 1949, it could not also reasonably have found (2) that the conspiracy included any understanding to conceal the conspiracy (in order to avoid detection and punishment for conspiracy) other than such an understanding implied in the mere fact of the conspiracy. The second of those findings would be bad, under *Krulewitch.* But the charge permitted the jury to render a verdict of guilty based on both such findings. I think the language in *Lutwak* cannot be stretched to sanction such a charge, and that therefore the charge was erroneous."

Judge Frank concludes that the Court erred in failing to instruct the jury that if it found that the conspiracy ended in 1949, they could not convict the defendants (Vol. V, Appendix pp. 383a, 384a).

Such charge was requested (Grunewald's Request No. 23, (793), Exception (728); adoption by Halperin of Grunewald's Requests and Exceptions (Transcript 4080; Appendix 729)).

III.

(Question Presented 10.)

The Court of Appeals' decision approving of the Trial Court's permitting the government on re-direct examination of Davis, to elicit from him the fact that he had made a prior consistent hypothetical statement respecting the Pattullo modes and Gotham payments, at a time when he had the same motive to make the statement as he did at the trial, introduces confusion into a hitherto well-settled rule of the law of evidence prohibiting proof of prior consistent statements under such circumstances.

On re-direct of Davis, the Government elicited from him over repeated objections (395-407), that at or about the time of the Brooklyn Grand Jury investigation in 1952, there were negotiations with a view to cooperation by Davis with the Government, at which Davis, himself, was not present, but which negotiations were held at conferences between Davis' attorney and the representatives of the Government (395, 398, 399).

Over continuing objection and exception (399-407), the Government elicited from Davis that at such conference, he authorized his "attorney to make certain disclosures there on a hypothetical basis" (399). The hypothetical situation, which he authorized his attorney to discuss, were the facts involved in a conspiracy to defraud the United States in connection with the *Gotham Beef* and *Pattullo Modes* cases (400). Davis said that he authorized his attorney to reveal the fact with respect to the $100,000 and $60,000 (401).

Thus, Davis had the same motives to fabricate as at the trial. In any event, the circumstances under which the

introduction of prior consistent statements are permissible, did not exist in this case.

Dowdy v. *United States,* 4 Cir., 46 F. 2d 417, 424;
58 Amer. Jur. 465 "Witnesses" Sec. 829;
United States v. *Potash,* 2 Cir. 118 F. 2d 54, 57.

The purported prior consistent statements of Davis, the record affirmatively shows, are barred under the limitations upon the rule set forth, *supra,* in the *Dowdy* case, and in the quotation from American Jurisprudence. The alleged consistent statements (1) were not made soon after the transaction to which they relate; (2) were not made at a time when such fact or facts pertinent to the issues involved as reasonably furnish some test of the witness' integrity and accuracy of recollection, and (4) the alleged consistent statements, it plainly appears, were made at a time when the witness had the same motive in speaking that governed him when testifying.

Moreover, the Trial Court, itself, invested this erroneously admitted testimony by Davis with the greatest force and effect, stating that it tended to refute the charge, that the testimony given by Davis at the trial was a fabrication (398, 404), when actually it had no such potentiality. It follows that the Court of Appeals' opinion appears to disturb an important principle of law.

IV.

(Question Presented 11.)

The Court of Appeals' opinion appears to hold that a person may be guilty of corruptly attempting to influence a witness by advising him to plead the Fifth Amendment even though the plea is justified. This is contrary to federal law on the subject.

The question of whether a person may be convicted of corruptly influencing witnesses solely on proof that he advised a witness to plead the Fifth Amendment where the witness was justified in doing so, even though the plea would also serve the interests of the person giving the advice, is an important question of Constitutional law not directly decided by this Court.

The reasoning of the Court in *United States* v. *Herron*, 28 F. 2d 122, 123, D. C. Calif., in holding that it is not the law to make criminal the act of advising a witness to plead the Fifth Amendment where he is justified in doing so irrespective of the motive of the person so advising, is sound, we respectfully submit. The Court wrote:

> "In the case of Ex parte Irvine (C. C. 1896) 74 F. 954, Circuit Judge Taft, now Chief Justice of the United States Supreme Court, in his decision said as follows: 'It is argued by counsel for the respondent that there was evidence before the trial court to show that the privilege was pleaded in bad faith, merely to save the defendants, and not to protect the witnesses from a prosecution of themselves. * * * We do not understand any of the American authorities to go so far as to hold that where from the evidence and the nature of the question, the court can definitely determine that the question, if answered in a particular way, will form a link in the chain of events to establish the commission of a crime by the witness,

the court should inquire into the motive of the witness in pleading his privilege.'

The witness himself, therefore, is protected in his claim of privilege by being allowed the privilege, irrespective of his motive for claiming the same.

In this case the defendant Herron is charged with influencing, by advising, the witness Rasmussen to claim a lawful privilege, and I do not believe it is the law or the policy of the law to make criminal, no matter what the motive might have been, the advising a witness to do that which was lawful and *would in fact* have protected the witness from disclosing self-incriminating matter." (Emphasis in original.)

The Court of Appeals' opinion, on the other hand, appears to affirm the conviction of Halperin on the corrupt influencing of witnesses counts upon evidence of advice to prospective witnesses to plead the fifth amendment when the witnesses could do so with ample justification. The Court wrote (Vol. V, Appendix p. 315a):

"The evidence adduced in support of Counts 6 and 7 describes attempts by Halperin himself to influence both Berman and Tobias. The substance of what Halperin said to both is reflected in the testimony of Berman that Halperin told him 'he felt he was going to stand on his constitutional rights and not do any talking. He wanted me to take the same stand, that I should not talk and stand on my constitutional rights. He mentioned the fact that he had done me a good turn and that was the least I could do for him.' "[12]

[12] Halperin's testimony was, that in March, 1952, he did not call Berman, but Berman called him (681), and Berman said that Davis was down to see him the day before (682). Berman told Halperin that Davis had told him he was trying to make a deal with the United States Attorney in the Eastern District for immunity for himself and his partner, and that he wanted Berman to back him up by stating that the $60,000 had been paid as a fee (682). This was the first that Halperin knew that $60,000 had been involved in the package (682). Berman asked Halperin what he thought he

The Court of Appeals' opinion appears contrary to the *Herron* case. It is manifest that not only the disposition of Counts 6 and 7, but also of Count 5 is affected by the Court's views contrary to those expressed in the *Herron* case.

Conclusion.

The writ of certiorari should be granted.

Respectfully submitted,

HENRY G. SINGER,
Attorney for Petitioner Halperin.

HARRY SILVER,
With him on the petition.

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should do and Halperin said that Berman should consult a lawyer and that "If you ask me as a lawyer, I would tell you to avail yourself of your constitutional privilege" (683). Halperin did not say that Berman had anything to fear by not talking (683), or that he, Halperin, had done Berman a good turn (683). Halperin never aided and abetted anyone to get Berman to lie or impede justice (684). He had no dealings directly or indirectly with Tobias on March 15, 1952 (684). Halperin denied any conversation prior to Davis speaking to Marks. Under Count Five, dealing with the influencing of Marks, there is no evidence that Halperin, himself, had any conversation with Marks with regard to his appearance before the Grand Jury, and no contention by the Government to the contrary. It is sought to hold Halperin in consequence of a discussion had by Halperin with Davis, Schopick and Hoffman, but all that was discussed there was a canvass of the sentiment of these defendants with regard to whether Davis' clients would plead their Constitutional privilege.

At first they felt that the clients would not talk and would plead their Constitutional privilege (367). Later, they became doubtful about this (368), and it was decided that Davis should communicate with Marks.

Fairly read, there is nothing in Davis' testimony with regard to these conversations which would warrant imputing to Halperin any intent that Davis should do more than merely ascertain his clients' intentions and perhaps to urge them to give further consideration to the advisability of their pleading their Constitutional privilege. Indeed, Davis' testimony shows clearly that his mission was merely one of inquiry and that he realized that there must be nothing said by him which could be used against him if Marks, as he expected, would report his conversation to the Grand Jury (369).

Appendix A.

Fifth Amendment.

"* * * nor shall be compelled in any criminal case to be a witness against himself * * *."

Section 371, Title 18 U. S. C.

"371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Section 3282, Title 18 U. S. C.

(As applicable to offenses prior to 1954 amendment.)

"3282. *Offenses not capital.*

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed. June 25, 1948, c. 645, 62 Stat. 828."

Section 1503, Title 18 U. S. C.

"1503. *Influencing or injuring officer*, juror or witness generally.—Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or

officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corrup or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both. (June 25, 1948, c. 645, Sec. 1, 62 Stat. 769.)"

Section 3481, Title 18 U. S. C.

"*Competency of accused.*—In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him. (June 25, 1948, c. 645, Sec. 1, 62 Stat. 833.)"

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 184

MAX HALPERIN,

Petitioner,

against

UNITED STATES OF AMERICA.

BRIEF ON BEHALF OF THE PETITIONER HALPERIN.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 184.

MAX HALPERIN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF THE PETITIONER HALPERIN.

Opinions Below.

The prevailing and dissenting opinions of the Court of Appeals (Appendix V, pages 288a, 316a, 381a) are reported in 233 F. 2d 556; upon rehearing another dissenting opinion was filed by the judge who first dissented and reported at 233 Fed. 2nd 592. All opinions below are printed in Appendix V, pages 288a to 393a.[1]

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[1] References to Appendix V are to page of Volume V of the appendix to the briefs filed in the Court of Appeals. Numerical references (not otherwise identified) are the pages of the record prepared and printed by the Clerk of this Court.

Jurisdiction.

The judgment of the Court of Appeals was entered April 10, 1956 (Appendix V, page 358a). Petitions for rehearing were denied June 1, 1956 (Appendix V, page 394a). Petition for a writ of certiorari was filed June 21, 1956 and granted October 15, 1956 (984). Jurisdiction is invoked under 28 U. S. C. 1254 (1).

Questions Presented.

Upon Halperin's petition the Court granted certiorari limited to the following questions (985-988).

1. When a defendant testifies in his own defense at his trial, and his answers to questions show that, although averring his innocence, he was justified in invoking the Fifth Amendment with regard to like questions before a Grand Jury—as in this case all agree—is not that defendant denied due process when the Government on cross-examination brings out before the trial jury, the fact that he refused to answer the questions before the Grand Jury, upon such constitutional grounds?

2. When a defendant has been subpoenaed to testify before a Grand Jury in an investigation, of which he is a primary target, has claimed his Constitutional privilege, advised the Grand Jury that he was doing so as an innocent man ensnared in suspicious circumstances and because he could not cross-examine or be represented by counsel, may the trial court charge the jury that they may consider his refusal to testify before the Grand Jury on the score of his credibility, although his trial testimony was entirely consistent with his position before the Grand Jury?

3. Under the circumstances surrounding a defendant's appearance before a Grand Jury as set forth in the last preceding paragraph, does not the Court's instruction as aforesaid illegally impeach and impede the defendant's statutory right to be a witness on his own behalf?

4. Does the rationale of *Raffel* v. *United States*, 271 U. S. 494, apply to prior invocation of the Fifth Amendment before a Grand Jury as distinguished from such action at a prior trial?

5. Does not the doctrine and rationale of *Slochower* v. *Board of Higher Education*, decided by this Court April 9, 1956, compel the conclusion that a defendant under the circumstances aforesaid, is denied due process of law when he is examined by the Government and compelled to admit that he refused to answer questions before the Grand Jury, and the Trial Court advises the jury they may consider that refusal on the subject of his credibility?

6. Is not a defendant, particularly one who asserted that he was invoking the Fifth Amendment as an innocent man being plotted against and beset by suspicious circumstances entitled to have the jury charged, "An innocent man may honestly claim his answers may tend to incriminate him"?

7. Does it constitute due process to subpoena a person to testify before a Grand Jury in an investigation of which he is a primary target, and thereby permit an examination before trial of a *de facto* defendant?

8. Does not the opinion of the Court of Appeals that the statute of limitations against conspiracy was not tolled, in that certain overt acts of concealment when committed

were chargeable to the original conspiracy disregard and deny effect to this Court's views on proof of subsidiary concealment conspiracies, as set forth in *Krulewitch* v. *United States*, 336 U. S. 440, and *Lutwak* v. *United States*, 344 U. S. 604?

9. Does not the conclusion of the Court of Appeals herein that a single conspiracy rather than a multiplicity of conspiracies are disclosed by the record, run counter to this Court's decision in *Kotteakos* v. *United States*, 328 U. S. 750?

11. Does a lawyer who advises a witness to plead the Fifth Amendment where the witness is justified in doing so become guilty of corruptly endeavoring to influence the witness merely because the interposition of the Constitutional privilege might also serve to protect the person giving the advice?

Constitutional Provisions and Statutes.

Fifth Amendment.

"* * * nor shall be compelled in any criminal case to be a witness against himself * * *."

Section 371, Title 18 U. S. C.

"371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Section 3282, Title 18 U. S. C.

(As applicable to offenses prior to 1954 amendment.)

"3282. *Offenses not capital.*

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed. June 25, 1948, c. 645, 62 Stat. 828."

Section 1503, Title 18 U. S. C.

"1503. *Influencing or injuring officer,* juror or witness generally.—Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence,

obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both. (June 25, 1948, c. 645, Sec. 1, 62 Stat. 769.)"

Section 3481, Title 18 U. S. C.

"*Competency of accused.*—In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him. (June 25, 1948, c. 645, Sec. 1, 62 Stat. 833.)"

Statement of the Case.

The indictment in the Southern District of New York containing seven counts was filed on October 25, 1954, against Max Halperin, Henry W. Grunewald, Daniel A. Bolich[2] and others: in Count 1 all defendants are charged with conspiracy to defraud the United States in the exercise of its governmental functions of administering the internal revenue laws, and to conceal the acts of the conspirators, in violation of the general conspiracy statute, 18 U. S. C., Section 371; in Counts 5, 6 and 7 petitioner Halperin and others are charged with having corruptly endeavored to influence witnesses before the Grand Jury in the Eastern District of New York in violation of 18 U. S. C., Section 1503. The conspiracy is alleged to have been in operation from January 1, 1946 to the return date of the indictment; and the activities of Halperin, charged

[2] Grunewald and Bolich likewise were granted certiorari on specific questions (984, 985, 987, 988).

in Counts 5, 6 and 7, are alleged to have taken place in March, 1952. Counts 3 and 4 were dismissed and are not involved on this petition.[3]

Although the Court of Appeals unanimously affirmed the convictions of Grunewald and Bolich, Judge Frank led a dissenting opinion as to the petitioner Halperin, holding that his Constitutional rights were violated, by the government's cross-examination at the trial, disclosing the fact that he had claimed his Constitutional privilege before the Grand Jury. Judge Frank again dissented from the majority ruling denying a re-hearing to the aforesaid defendants, this time extending his dissent to the Statute of Limitations' point, and holding that the conviction of all of the defendants under Count 1 was barred by the Statute of Limitations.

The charges in the indictment arose out of the administrative disposition of two alleged tax evasion cases which were being investigated by the Internal Revenue Bureau. One was known as the *Pattullo Modes* case and the other as the *Gotham Beef* case. Both concerns were represented by the New York law firm of Schopick & Davis (300, 314-315). Halperin, a practicing attorney for forty-five years (602), now in his 72nd year (601), had shared office space with the firm at the time in question (603-605).

According to the testimony of Davis, who was the government's chief witness, he had suggested to Halperin that Halperin contact Grunewald in Washington to get help in

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[3] Count 2 of the indictment was against Bolich, Sternberg and Scherm as employees of the Bureau of Internal Revenue. Sternberg and Scherm were acquitted, Bolich was convicted. Davis, Schopick and Hoffman were named as defendants, but the case as to them was severed. Petitioner Halperin was sentenced to five years imprisonment and $5,000 fine on count 1, and two years imprisonment and $1,000 fine on each of counts 5, 6 and 7, prison sentences to run concurrently.

Grunewald was convicted of conspiracy under Count 1, but the Court acquitted him under Counts 5, 6 and 7 (569).

the *Pattullo Modes* case and that Halperin, after some negotiation, told him that Grunewald had agreed to accept $100,000 (325-328). Thereafter, on January 5, 1949, Bolich, then Assistant Commissioner of Internal Revenue, told the Agent in charge of the *Pattullo Modes* case to close out the *Pattullo Modes* case on a non-prosecution basis (464-465). This decision was announced to the taxpayers on January 10, 1949 (433, 466, 467).

The object of the Pattullo Modes transaction was expressed by its principal, Marks, named as co-conspirator, but not indicted, as follows:

> "He [Davis] says all he could promise us that there would be a memorandum put into our file that the case was to be settled on a civil basis" (32).

In the *Gotham Beef* case, according to the government's proof, $60,000 was put in escrow by the principals therein (166, 167, 323) and on October 28, 1948, they were told that the case was closed without criminal prosecution (282).

The object of this transaction was expressed by the Gotham Beef principal Tobias, also named as a co-conspirator, but not indicted, as follows:

> "Now, the exact terms of the escrow * * * was * * * that until I were to have heard with my own ears from the Special Agent's office from a responsible official that there was to be no criminal prosecution in the Gotham matter * * * the money was not to be released" (165, 166).

Halperin, a lawyer, now over 71 years of age, was the only one of the three convicted defendants who testified in his own behalf. His testimony on direct showed his professional association with several alleged co-conspirators, and

his acquaintanceship with others, and professional employment in connection with the tax matters (605-670). Halperin strongly protested his innocence. His narration of the extent of his participation in the tax matters being entirely exoneratory in tenor (Pattullo Modes, 606-609, 614-616, 620-622, 626-631); (Gotham Beef, 651-655, 659).[4]

Thereupon, the Government was permitted to elicit from Halperin, and bring to the conspicuous notice of the jury upon cross-examination, over objection and exception (684, 693), that Halperin had invoked the Fifth Amendment before a Grand Jury in response to questions relating to the aforesaid associations and dealings (683-696) despite the fact that both the majority opinion and the dissenting opinion in the Court of Appeals acknowledge that Halperin was justified in claiming his Constitutional privilege upon the record (Vol. V—Appendix pages 311a, 317a).[5]

On re-direct, it was shown by reference to the Grand Jury minutes, that Halperin informed the Grand Jury that he was an innocent man and that he was invoking the Fifth Amendment (705), because he had no right to cross-examine witnesses against him in Grand Jury proceedings (708). Halperin also advised the Grand Jury that he was acting on advice of counsel (705, 707). Halperin, it must be noted further was a target of the Grand Jury investigation (696-698).

Thus, it was affirmatively, and indeed, conclusively shown that no inconsistency existed between Halperin's course of conduct before the Grand Jury and at the trial. Nevertheless, in this case, in which all that could stand

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[4] Judge Frank, commenting upon the evidence, wrote (Vol. V appendix page 329a):

"The evidence against Halperin is not overwhelming. The jury could have reasonably acquitted him."

[5] Judge Frank wrote "No one doubts he then properly asserted the privilege" (Vol. V appendix, 317a).

between Halperin and conviction was his credibility, the Trial Court authorized the jury to reject his testimony on the ground that he had asserted his Constitutional privilege before the Grand Jury (748, Exception 756).

Moreover, the Trial Court denied the request to charge "An innocent man may honestly claim that his answers may tend to incriminate him" (774, 712, 713).

The only overt acts shown to have been committed within three years of the filing of the indictment, related only to acts of concealment. Hence, prosecution was barred under 18 U. S. C., Section 328—all agree—Prevailing Opinion (Vol. V—Appendix p. 310a), Dissenting Opinion, (Vol. V—Appendix pp. 385a, 386a), unless there existed an endlessly surviving conspiracy to conceal as part of the original conspiracy.

After the credibility of the co-conspirator Davis (as to whom trial had been severed) who was the Government's principal witness, had been subjected to devastating attack, the Government on re-direct attempted to rehabilitate him by eliciting from him over objection and exception (388-399) that on or about the time of a Grand Jury investigation into the subject matter of this prosecution, and pursuant to a proposal by the witness that he would cooperate with the Government in its case against the appellants herein (389, 391, 392), Davis had made, through an attorney, a hypothetical statement consistent with his trial testimony. This testimony was admitted despite the fact that Davis' motive to fabricate at that time coincided with his motive to fabricate at the trial.

In February 1952 a grand jury was empaneled in the Eastern District of New York, to investigate fraud in the administration of the Internal Revenue Laws and their enforcement. It was this Grand Jury which subpoenaed Halperin and before which he appeared and refused to answer the questions on the ground of self-incrimination.

The evidence in support of the charge in Counts 6 and 7 tht Halperin attempted to corruptly influence Berman and Tobias, Gotham Beef principals, as prospective witnesses, shows however that Halperin merely advised them to plead the Fifth Amendment after learning from Berman for the first time that $60,000 had been put up by them in escrow in connection with their tax case (666).

Under Count 5, there was no evidence that Halperin himself had spoken to the Pattullo Modes principals concerning his role as a grand jury witness. The evidence did not support conviction in consequence of Davis' conversation with Marks since all that had been discussed by Halperin with Davis was speculation as to whether his clients would claim their Constitutional privilege before the grand jury (361, 362).

Summary of Argument.

I: Halperin was denied due process of law, in derogation of the Fifth Amendment, when despite the undisputed facts (a) that Halperin was justified in claiming his constitutional privilege before the grand jury, and (b) that his trial testimony was entirely consistent with his course of conduct before the grand jury, whom he had advised that he was claiming his privilege as an innocent man, the government was nevertheless permitted to elicit from Halperin as a calculated feature of cross examination, that he had invoked the Fifth Amendment before the grand jury, and the Trial Court authorized the jury to discredit Halperin's trial testimony by reason of the aforesaid claim of constitutional privilege.

The aforesaid cross examination of Halperin, and the aforesaid charge to the jury constituted penalization of Halperin for having exercised his constitutional privilege, and under the doctrine and rationale of this Court's recent

decision in *Slochower* v. *Board of Higher Education*, 350 U. S. 551, constituted a denial of due process. Particularly, does this result follow when cognizance is taken of the widespread mistaken conviction that those who claim their constitutional privilege under the Fifth Amendment are either committing perjury or covering up their guilt, as this Court observed in *Ullman* v. *United States*, 350 U. S. 422.

In *Johnson* v. *United States*, 318 U. S. 189, this Court adopting the language of a Pennsylvania Supreme Court opinion noted that "The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inference whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right."

The case of *Raffel* v. *United States*, 271 U. S. 494, does not apply to the facts herein, and in any event has been implicitly overruled by this Court, in the *Johnson* and *Slochower* cases. In *Raffel* this Court held it was not error to require Raffel when testifying at his second trial, to disclose that he had not testified at his first trial. In that case, comparison was being made of Raffel's actions upon two occasions, each of which was a trial in both of which he was a defendant. In our case the comparison is between a grand jury investigation and a trial which are distinctly unlike juridical quantities and hence furnish no basis for correlating refusal to testify at a grand jury investigation in terms of consistency, with testimony at a trial. The difference is noted at length in the dissenting opinion of Judge Frank herein (Appendix Volume V, 324a, 325a).

Moreover, in *Raffel*, this Court merely adjudicated the question certified to it, namely, whether it was error to compel Raffel to disclose that he had failed to testify at the first trial. The opinion of this Court plainly indicated that only if interrogation regarding the defendant's failure to testify at the first trial produced discrediting evidence

might the jury be entitled to deem his credibility impaired (p. 498 of 271 U. S.). In our case, no inconsistency between Halperin's position at the grand jury and at the trial developed. On the contrary, the trial testimony undisputedly shows that Halperin's claim of constitutional privilege at the grand jury was accompanied by a statement pointing to the very differences between a grand jury examination and a trial as the grounds for his refusal to testify at the grand jury and implicitly promising that he would testify at the trial, which he did.

Moreover, as Judge Frank's opinion further states, the *Raffel* doctrine applied to the instant case should be regarded as erroneous. Indeed, it had already been overruled at least inferentially by this Court (Volume V, Appendix, 320a, 321a, 323a). The error in the *Raffel* doctrine when applied to the facts herein is that it is practically impossible to limit the jury's use of the evidence regarding Halperin's claim of his constitutional privilege to credibility as distinguished from proof of guilt, and since this Court is formally on record in holding that the claim of constitutional privilege does not constitute proof of guilt, the evidence must be excluded altogether. (To the same effect see also 21 Illinois Law Review, 396-340, quoted at length in Judge Frank's opinion, Volume V, Appendix, 319a, 320a; McCormick on Evidence, p. 77 (1954).)

Judge Frank notes further that the *Raffel* case has been overruled in *Johnson* v. *United States*, 318 U. S. 189, *supra* (Volume V, Appendix, 323a, 327a, 329a), and that the primacy of the constitutional privilege is further strengthened by recent decisions of this Court, culminating in *Slochower* v. *Board of Higher Education*, 350 U. S. 551.

The Trial Court compounded the prejudicial effect of the instruction authorizing petitioner's conviction via destruction of his credibility because of his invocation of

the Fifth Amendment by refusing to charge as requested that "an innocent man may honestly claim that his answers may intend to incriminate him."

Still another aspect of the multiple error implicit in the Court's rulings arises from the fact that a defendant has a statutory right to testify and that the aforesaid rulings herein impaired that statutory right and is prejudicial to a defendant's right to elect whether he should take the stand (compare *Johnson* v. *United States*, 318 U. S. 189, *supra*).

II. Upon the record, Halperin was a primary target of the grand jury's investigation and a de facto defendant when he was subpoened before the grand jury where he claimed his constitutional privilege. Calling a person thus situated to testify before a grand jury is in itself a violation of his constitutional rights (*People* v. *De Feo*, 308 N. Y. 595, 602, 603 (1955), citing *Counselmann* v. *Hitchcock*, 142 U. S. 547; *United States* v. *Lawn*, 115 F. Supp. 674; *United States* v. *Blanton*, 77 F. Supp. 812).

Thus if the fact that Halperin claimed his constitutional privilege constitutes evidence against him, it is evidence illegally obtained and should not have been elicited (*Weeks* v. *United States*, 232 U. S. 383).

III. The Court of Appeals opinion indicates that the Court confirmed the conviction of Halperin on the corrupt influencing of witnesses counts solely on evidence that he advised prospective witnesses, who had ample justification to do so, to plead the Fifth Amendment. This was error (*United States* v. *Herron*, 28 F. 2d 122, 123; *United States* v. *Courtney*, 2d Cir. 236 F. 2d 921).

Moreover, the corrupt influencing of witnesses statute must be deemed unconstitutionally vague if it is to be applied to advice given to plead the Fifth Amendment.

IV. The Court of Appeals erred in holding that the Statute of Limitations did not bar prosecution of Halperin on the conspiracy charge. The principle argument and summary on the subject of the Statute of Limitations appears in Grunewald's brief upon which Halperin relies. Halperin also relies upon the argument and summary in Bolich's brief on the subject of multiplicity of conspiracies, particularly as it bears upon the Statute of Limitations question.

ARGUMENT

I.

Halperin was denied due process of law in derogation of the Fifth Amendment at the trial when despite the undisputed facts

(a) that Halperin was justified in claiming his constitutional privilege before the grand jury.

(b) that his trial testimony was entirely consistent with his course of conduct before the grand jury, whom he had advised that he was claiming his privilege as an innocent man.

1. **The government was permitted to elicit from Halperin, as a calculated feature of cross-examination that he had invoked the Fifth Amendment before the grand jury.**
2. **The trial court authorized the jury to discredit Halperin's vital trial testimony by reason of the aforesaid claim of constitutional privilege.**
3. **The trial court refused to charge that "An innocent man may honestly claim that his answers may tend to incriminate him".**

A. (Questions Presented 1, 2, and 5).

There can be no doubt that Halperin's defense was impeached beyond redemption the moment the govern-

ment launched upon the project of impressing upon the attention of the trial jury, the fact that Halperin had taken advantage of his constitutional right not to give evidence against himself before the grand jury. By such expose, belabored at some length (684-708), Halperin was subjected to arbitrary penalty for having taken advantage of his constitutional right, in view of the popular misconception that the constitutional privilege against the giving of testimony against oneself was intended only for the protection of the guilty.

As stated by Professor Ralph S. Brown Jr., professor of law at Yale Law School, in 40 American Bar Association Journal 404, 406, May, 1954.

> "What does the public know about the Fifth Amendment anyway? It is told in every headline on the authority of prominent legislators, that silence means guilt."

This court in *Ullman* v. *United States*, 350 U. S. 422, (March, 1956) took cognizance of the permeating extent of the prejudice against those who invoke the Fifth Amendment which necessarily abides in the mistaken conviction that those who claim the privilege are either covering up their guilt or are committing perjury. This court wrote at p. 426 of 350 U. S.,

> "Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege."

Enlarging its comment, this court, in *Slochower* v. *Board of Higher Education*, 350 U. S. 551, 557 (April 9, 1956) wrote further:

"In Ullman *v.* United States, 350 U. S. 422, decided last month, we scored the assumption that those who claim this privilege are either criminals or perjurers. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. As we pointed out in Ullman, a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances. See, Griswold, The Fifth Amendment Today (1955)."

The jury's latent prejudice against Halperin, thus generated by the government's persistent canvass of the subject of Halperin's claim of constitutional privilege before the grand jury was necessarily intensified, activated and channelized by the trial court's charge authorizing the jury to disbelieve Halperin's testimony and, in effect, convict him in consequence of his having invoked the Fifth Amendment before the grand jury.

The trial court charged (748):

"No witness is required to take the stand or or required to give testimony that might tend to incriminate him; but when a defendant takes the stand in his own defense at a trial, *it is proper to interrogate him as to previous statements which he may have made under oath concerning the same matter, including his assertion of his constitutional privilege to refuse to testify as to those matters before a grand jury. You may use this evidence of a defendant's prior assertions of the Fifth Amendment for the sole purpose of ascertaining the weight you choose to give to his present testimony with respect to the same matters upon which he previously invoked his privilege.*

> The defendant had the right of asserting the Fifth Amendment when he appeared before the grand jury, and I charge you that you are not to draw any inference whatever as to the guilt or innocence of the defendant in this case by reason of the fact that he chose to assert his unquestioned right to invoke the Fifth Amendment on that previous occasion.
>
> *However, it was proper for the Government to question the defendant with respect to his previous invocation of the Fifth Amendment, but you may consider this evidence of his prior assertions of the Fifth Amendment only for the purpose of ascertaining the weight you choose to give to his present testimony with respect to the same matters upon which he previously asserted his constitutional privilege.* It is not considered in a determination of the guilt or innocence of any co-defendant." (Italics ours.)

For appellant's exception to this charge see footnote (6) this page.

It is respectfully submitted that given the acknowledged circumstances (a) that Halperin was justified in claiming his constitutional privilege before the grand jury, as the prevailing and the minority opinions in the Court of Appeals, (Vol. V—Appendix 311a, 317a)[7] and the trial

[6] "I respectfully except to your Honor's reference to the testimony of Halperin and the cross examination of Halperin in connection with his grand jury testimony, and I respectfully except particularly to your Honor's language where your Honor said it was proper for the Government to interrogate Halperin in connection with his claim of constitutional privilege. And I respectfully except to your Honor's failure to tell the jury that innocent men have a right to use and claim the privilege. And I respectfully except to your Honor's statement to the jury that they may use the evidence of Halperin's claim of constitutional privilege as a basis by which they could judge the weight of his testimony at this trial." (756)

[7] Judge Frank wrote, "No one doubts he then properly assented the privilege" (Vol. V—Appendix, 317a).

court (748) agree; (b) that his trial testimony was entirely consistent with his refusal to testify before the grand jury, whom he had informed that he was innocent but that he would not give evidence against himself by advice of counsel, and because he could not cross-examine the witnesses against him before that tribunal (704-706)—that given all these separate and cumulative factors—the charge of the court authorizing the jury to disbelieve Halperin when his credibility was all that stood between him and conviction was a denial of due process under the doctrine and rationale of *Slochower* v. *Board of Higher Education*, 350 U. S. 551 *supra*.

In the *Slochower* case, this court held that due process was denied a municipal employee whose discharge was based upon his exercise of his constitutional right under the Fifth Amendment, where,

> "No consideration is given to such factors as * * * justification for exercise of the privilege. * * * or legal advice conscientiously given, whether wisely or unwisely". (P. 558 of 350 U. S.)

The trial court herein gave no consideration to justification, absence of inconsistency, or advice of counsel.

The jury was given the untrammelled right to discredit Halperin's testimony and protestations of innocence in consequence of the bare circumstance that he claimed his constitutional privilege without regard to his "justification for exercise of the privilege" and "legal advice conscientiously given", and in spite of the fact that both justification and legal advice with regard to the claim of privilege were clearly shown, and indeed not controverted. If Halperin was justified in refusing to testify before the Grand Jury, as both the majority and dissenting opinions and the trial court acknowledged, there can be no inconsistency

affecting credibilty, particularly in view of the difference in nature of the forums of the Grand Jury and the trial court, and Halperin's statement to the Grand Jury, basing his motivation for claim of privilege upon such difference.

Halperin's credibility, in all realism, was all that stood between him and conviction. To tell the jury that they might disbelieve Halperin in consequence solely of his utilization of his constitutional right is itself denial of due process, we respectfully submit, within the purport and tenor of the *Slochower* decision; even more immediate and direct than the denial of due process in the *Slochower* case inherent in Slochower's discharge. There only a governmental position was taken from the defendant, by a local body. Here, his very liberty is taken from him by an arm of the federal government itself.

That the assertion of constitutional privilege is not itself a ground for impeaching a witness' credibility was clearly enunciated by this Court in *Johnson* v. *United States,* 318 U. S. 189. In that case, Johnson testifying in his own behalf at his trial for income tax evasion for the years 1936 and 1937, asserted his constitutional privilege when interrogated by the government respecting income from illegal sources in 1938. The trial Court sustained Johnson's refusal to answer, but in his charge to the jury stated that Johnson's refusal to answer "may only be considered by you in testing his credibility . . ." (p. 195 of 318 U. S.).

This Court wrote (p. 196, 197 of 318 U. S.):

> "But where the claim of privilege is asserted and unqualifiedly granted, the requirements of fair trial may preclude any comment. That certainly is true where the claim of privilege could not properly be denied. The rule which obtains when the accused fails to take the stand (Wilson *v.* United States, 149

U. S. 60, 37 L ed. 650, 13 S. Ct. 765) is then applicable. As stated by the Supreme Court of Pennsylvania, "If the privilege claimed by the witness be allowed, the matter is at an end. *The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right.* The allowance of the privilege would be a mockery of justice, if either party is to be affected injuriously by it." Phelin *v.* Kenderdine, 20 Pa. 354, 363; Wireman *v.* Com., 203 Ky 62, 63, 261 SW 862. And see State *v.* Vroman, 45 SD 465, 473, 188 NW 746; Carne *v.* Litchfield, 2 Mich. 340; People *v.* McGungill, 41 Cal. 429. We also think that the same result should obtain in any case where the court grants the claim of privilege and then submits the matter to the jury, if that action may be said to affect materially the accused's choice of claiming or waiving the privilege and results in prejudice. The fact that the privilege is mistakenly granted is immaterial." (Italics supplied.)

In our case it is undisputed, as we have noted, that Halperin's claim of privilege was properly invoked by him; and properly allowed by the grand jury. Thus, the rule of the Johnson case is all the more readily available for application herein—uncomplicated by the problem posed by a mistaken claim and grant of privilege, notwithstanding which this court nevertheless upheld the primacy of the unchallenged assertion of the privilege.

In the language of the Pennsylvania court, adopted by this court in the *Johnson* case, Halperin's "claim of privilege and its allowance is properly no part of the evidence submitted to the jury and no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right."

The Slochower and the Johnson rationale was anticipated in *Masterson* v. *Transit Co.*, 204 Mo. 507, 524, 525, in which the court wrote:

> "The right of the motorman to refuse to testify under the circumstances stated was a personal right of such high importance that it is expressly guarded in the Constitution itself. It is there given absolutely and unequivocally, yet we are now asked to declare that it is a right which the citizen will exercise at his peril, the peril of being branded with suspicion, the peril of having it brought up against him to impeach himself if he should ever assert his innocence. Such a ruling would be a gross impairment of the constitutional right;"

It is respectfully submitted that the *Masterson* case view coincides with the recent decisions of this Court culminating in the *Slochower* decision.

There is no more firmly established rule in the field of evidence than that which requires that only when inconsistency has been shown may former conduct be weighed against the witness' credibility (3 Wigmore on Evidence, Page 725, Section 1040).

It is interesting to note that in *Commonwealth* v. *Smith*, 163 Mass. 411, 432, the Court in approving the right to cross-examine a witness regarding a prior claim of refusal to answer on the ground of self-incrimination, found it necessary first to search for and purport to find the element of inconsistency. The Court wrote:

> "The defendant in such case now says he is innocent. He formerly did not say he was innocent, but that he would not answer lest he might incriminate himself."

In our case, even this misconceived inconsistency did not exist. Halperin did not give his explanation for not

testifying before the Grand Jury for the first time at the trial, but had given the same explanation to the Grand Jury itself. Halperin *did* formerly say he was innocent and his testimony shows moreover that his innocence was of a nature, as noted in the *Slochower* case, beset by circumstances of guilt which justified this action.

The Massachusetts Court erred in failing to recognize that innocence and self-incrimination are not mutually exclusive but may readily co-exist, but within the framework of the Court's mistaken view, the fact remains the Court appreciated that it must be able to pinpoint an inconsistency before it could hold the witness' credibility may be deemed impeached by the jury.

How far the trial court went to accomplish the destruction of Halperin's credibility in consequence of his claim of privilege, and thereby to effectuate his conviction appears from the following:

While Halperin was being cross-examined, the Court interpreted the Constitutional privilege in such fashion as to literally destroy the defendant Halperin's credibility. The court said (685-6) "I know the Government's position. As I see it, Mr. Corbin, no witness can be compelled to testify against himself. The witness is called before the grand jury and the answer was, I refuse to answer something on the ground that if I answer that question it will incriminate me. Mr. Corbin: Tend to incriminate. The Court: Or tend to incriminate.***."

The Court went further and said (691). "The Court: Would an answer to that question have incriminated you or tend to incriminate you?" Upon objection, it was withdrawn. Again, while Mr. Halperin was still being examined with respect to his claim of privilege before the Grand Jury, the Court asked (693) "And you say the answers given were true?", to which again objection was

taken, and the Court went on to say "The witness says he testified before the Grand Jury. I want to find out, when he says the question is there and the answer is there, whether he is also conceding that he was sworn to tell the truth and it was a truthful answer; not that it is merely in the minutes, but that that is the sworn testimony."

Counsel objected that it was an implication by the Court that the witness was lying. The Court again replied that he was not implying "that it was untrue"; that all he wanted to find out was that the defendant was not merely admitting that it was in the minutes, but that it was sworn testimony (693-694).

During the exchange motion for a mistrial and the withdrawal of a juror was made, it was denied and an exception taken (704).

It is, thus, obvious that with the leverage of Halperin's claim of privilege, the Court destroyed his credibility before the jury and the charge was even less than lip service to the rule.

B. (Question Presented 4).

Under this subdivision we discuss, not only the question whether the rationale of *Raffel* v. *United States*, 271 U. S. 494, applies to a prior invocation of the Fifth Amendment before a Grand Jury as distinguished from failure to testify at a prior trial (Question Presented 4), but the related questions of the correctness of the ruling in the *Raffel* case and its present status in view of the recent trend of decisions by this court.

(1).

In the *Raffel* case, on a first trial, the defendant therein did not testify in his own defense, although a government agent testified to an admission by the accused. On a second

trial the government agent gave similar testimony. This time the defendant took the stand and denied making the admission, and thereupon was compelled to acknowledge that he had not testified at the first trial. This court held it was not error to require Raffel to disclose that he had not testified at the first trial.

Since both occasions upon which comparison of Raffel's action was being made were trials, and hence, like quantities for the purposes of appraising his election to testify or not to testify, it was possible to urge that testifying at one trial was inconsistent with failure to testify at the other. However, a Grand Jury investigation and a trial are distinctly unlike quantities,—totally different categories —and hence furnish no basis for correlating refusal to answer questions at a Grand Jury investigation in terms of consistency with testimony at a trial, as far as the invocation of the privilege is concerned.

This is commented upon, at length, in Judge Frank's dissenting opinion, in support of his holding that

> "Raffel does not apply to the facts here" (Vol. V, Appendix 317a).

Judge Frank wrote (324a, 325a):

> "However, the rationale of the Johnson decision [Johnson v. United States, 318 U. S. 189, *supra*] becomes stronger, not weaker, in such circumstances. For a man in a grand jury hearing may have far better reasons for preserving silence: There he is not confronted with the adverse witnesses, has no opportunity to cross-examine them, cannot object to the reception of evidence which would be incompetent at a trial, is unable to call witnesses on his behalf, has no counsel to advise him, must submit to a secret and *ex parte* examination 'without the presence and control of a judge or any other impartial

official to * * * intervene, * * * to protect' him. As Judge Learned Hand said in 1953, 'Save for torture, it would be hard to find a more effective tool of tyranny than (this) power of unlimited and unchecked *ex parte* examination.'

Accordingly, even apart from the effect of the *Johnson* case, the Raffel doctrine is inapposite here: In Raffel, the defendant at his first trial had the same opportunity as at his second trial to confront and cross-examine the adverse witnesses, to be assisted by counsel, to object to incompetent evidence, to summon witnesses on his behalf, etc., etc. Nor should we forget that the constitutional privilege had its English origin in protests against questioning persons, *ex parte* and in secret, before they had been formally charged with any crime. It is noteworthy that the *Supreme Court has never applied the Raffel doctrine to a case where the previous exercise of the privilege occurred in a grand jury hearing.*" (Italics in original.)

It is thus apparent that since inconsistency does not complicate the situation herein, and all that appears is that Halperin properly invoked his privilege and was properly granted it, that no impediment exists to the plenary application of the *Johnson* doctrine to the facts herein, to wit that Halperin's claim of privilege is properly no part of the evidence to be submitted to the jury.

Moreover, it is noteworthy that this Court in the *Raffel* case merely adjudicated the question certified to it which was whether it was error to compel Raffel to disclose that he had failed to testify on the first trial. This Court did not hold that the Trial Court was entitled to charge the jury that his failure to testify on the first trial impeached his credibility or that the jury might so find. On the contrary, the opinion of this Court plainly indicates that only if inter-

rogation regarding the defendant's failure to testify at the first Trial produced evidence of discrediting motive might the jury deem his credibility impaired, on the score of his testimony in chief (p. 498 of 271 U. S.).

In our case, as we have noted, Halperin's claim of constitutional privilege was accompanied by a statement pointing to the very differences between a grand jury examination and a trial as the grounds for his refusal to testify and implicitly promising to testify at a trial. Thus even if the government could initially inquire into the subject, Halperin's answers were productive of no basis, under the *Raffel* doctrine, for the trial court to invite the jury to disbelieve Halperin's testimony in chief.

(2).

Judge Frank's opinion urged further that even if the *Raffel* doctrine applied to the instant case, it should (a) be rejected as erroneous and (b) that it has already at least, inferentially been overruled by this court.[8]

(a) Judge Frank cites in support of his argument that the *Raffel* decision is erroneous, the criticism of the case by Hinton which appeared in 21 Ill. L. Rev. (1926) 396-400. Hinton noted that since it is practically impossible where the witness in question is the defendant himself to limit the jury's use of the evidence of prior silence to credibility as distinguished from proof of guilt that the policy of the law should be to exclude it altogether.

See, quotation from the Hinton article, in Judge Frank's opinion (Vol. V, Appendix 319a, 320a).

[8] Judge Frank's opinion was written before this court's decision in the *Slochower* case. The Court of Appeals decision was announced on April 10, 1956. The *Slochower* case decision was handed down on April 9, 1956.

Judge Frank in his opinion adds (320a, 321a):

> "Hinton was surely correct in saying that a jury will not be able to heed the judge's cautionary charge that such evidence must be given effect solely in its bearing on the credibility of the accused. Like many other sorts of cautionary instructions, it asks the jury to do the well-nigh impossible. In Nash *v.* U. S., 54 F. 2d 1006 (C. A. 2), Judge Learned Hand wrote of 'the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else'; in U. S. *v.* Gottfried, 165 F. 2d 360, 367 (C. A. 2), he said, 'nobody can indeed fail to doubt whether the caution is effective * * *'; see also his remarks in U. S. *v.* Paoli, F. 2d (C. A. 2), (January 10, 1956): In U. S. *v.* Antonelli Fire Works Co., 155 F. 2d 631, 656 (C. A. 2, dissenting opinion) it was noted that a cautionary instruction may emphasize the very matter the jury is told to forget, 'as in the story, by Mark Twain, of the boy told to stand in a corner and not think of a white elephant.' Mr. Justice Jackson, concurring in Krulewitch *v.* U. S., 336 U. S. 440, 453, observed: 'The naive assumption that prejudicial effects can be overcome by instructions to the jury * * *, all practicing lawyers know to be unmitigated fiction.' It 'is well enough,' said Wigmore (8 Wigmore, p. 416), 'to contrive artificial fictions for use by lawyers, but to attempt to enlist the layman in the process of nullifying his own reasoning powers is merely futile, and tends towards confusion and disrespect for the law's reasonableness.'"

McCormick on Evidence (1954) fortifies the position of Hinton and Judge Frank. The text states (p. 77):

> "The only available sanction for our rule is an instruction that the jury must not consider the prior statements of the witness as substantive evidence on the main issue, but solely as bearing on the

credibility of the witness. Such an instruction, as seems to be generally agreed, is a mere verbal ritual. The distinction is not one that most jurors would understand. If they could understand it, it seems doubtful that they would attempt to follow it. Trial judges seem to consider the instruction a futile gesture."

In footnote 16, page 77, the author states further:

> "All five of the Texas District Judges who answered my inquiry agreed on this, see note 13, *supra*. One of their comments follows: 'It is my opinion that an instruction to the jury advising that "the prior inconsistent statement can only be considered for impeachment purposes", is not understood by the average jury, and even a jury composed of lawyers would have difficulty in drawing such a fine distinction.' "

The case of Halperin, the accused, testifying in his own behalf constitutes a classic example of the futility of directing a jury to limit its use of the evidence that Halperin invoked the Fifth Amendment to the sphere of credibility —inevitably the substantive and the credibility phases of the case coalesced and merged in the minds of the jury.

Thus, since the claim of constitutional privilege is not evidence of guilt (*Ullman* v. *United States*, 350 U. S. 422, 426, 427; *Slochower* v. *Board of Education*, 350 U. S. 551, 557), if more than mere lip service is to be given to the constitution as the supreme law of the land, then it follows that the rule of the *Johnson* case must be adhered to and the matter of the claim of constitutional privilege be deemed no part of the evidence in the case.

(b) Judge Frank in his opinion notes that this court's decision in *Johnson* v. *United States*, 318 U. S. 189 *supra*,

overrules the *Raffel* case (Vol. V—Appendix 323a). It is difficult to see how the language of the *Johnson* case quoted *supra,* admonishing that "no inferences whatever can be legitimately drawn by them [the jury] from the legal assertion by the witness of his constitutional rights" can co-exist with the doctrine of the *Raffel* case.

Moreover, the primacy of the right to claim the constitutional privilege without subsequent penalization therefor has been strengthened by the recent sequence of decisions in this court, including *Quinn* v. *United States,* 349 U. S. 155, and *Emspak* v. *United States,* 349 U. S. 190, and culminating in *Ullman* v. *United States,* 350 U. S. 422, *supra,* and *Slochower* v. *Board of Education,* 350 U. S. 551 (See, Judge Frank's opinion, Vol. V—Appendix 327a, 329a).

Actually, however, as we have urged, the overruling of the *Raffel* case is not essential to a determination that it was error for the trial court herein to instruct the jury that Halperin's credibility might be deemed impeached by his claim of constitutional privilege.

C. (Question Presented 6).

The Trial Court compounded the prejudicial effect of the instruction authorizing petitioner's conviction via the destruction of his credibility because of his invocation of the Fifth Amendment by refusing to charge as requested that "An innocent man may honestly claim that his answers may tend to incriminate him" (774, 712, 713, 714), especially in view of the Court's attitude toward Halperin's claim of constitutional privilege, as exemplified by his above-noted remarks in the course of trial.

The prevailing opinion in the Court of Appeals overlooked the vital difference between the requested charge, and that given (748); the requested charge would have

served to correct the jury's misconceptions that an innocent man can not claim to be incriminated by his answers, and thus have explained to the jury why Halperin's action before the Grand Jury was irrelevant to the issues. The charge as given merely arbitrarily directed the jury to disregard what they undoubtedly deemed an important relevant fact, namely that an innocent man did not invoke the privilege (*Ullman* v. *United States*, 350 U. S. 442, 446 *supra*, 40 Amer. Bar Ass'n Journal 404, 406, *supra*). It was a futile and meaningless arbitrary effort to stop the jury short of utilizing the fact of claim of privilege substantively, as proof of guilt while investing it nevertheless with far reaching derogatory importance (Vol. V, Appendix, 319, 321a; McCormick on Evidence, p. 77). On the other hand the charge as requested would have been an exposition in the nature of that of this court in the *Ullman* and *Slochower* cases, *supra*.

D. (Question Presented 3).

Still another aspect of the multiple error implicit in the Court's rulings arises from the fact that a defendant has a statutory right to testify, no less than a right not to testify. The Government in a criminal case has no right to prejudice the defendant's election of whether or not he should take the stand in his own behalf. In the interest of the full development of the facts at a criminal trial, a defendant's right to testify (18 U. S. C. 3481) should be safeguarded, no less than his right not to testify, and should not be prejudiced in advance. This indeed is a further basis of this court's decision in *Johnson* v. *United States*, 318 U. S. 189, *supra*, holding that the jury may not legally draw any inference from a claim of privilege and that the making of such claim is not evidence to be submitted to the jury.

This court wrote (at p. 197 of 318 U. S.):

> "An accused having the assurance of the court that his claim of privilege would be granted might well be entrapped if his assertion of the privilege could then be used against him."

* * * * * *

(at p. 199):

> "When it [the court] grants the claim of privilege but allows it to be used against the accused to his prejudice, we cannot disregard the matter. That procedure has such potentialities of oppressive use that we will not sanction its use in the federal courts over which we have supervisory powers."

(See, also, *United States* v. *Modern Reed and Rattan Co.*, 2 Cir., 159 F. 2d 656, 658, for another holding to the effect that the government has no right to prejudice the defendant's election of whether or not he should take the witness stand).

If the government is to be permitted to elicit upon cross examination of a defendant at a criminal trial that he claimed his constitutional privilege before a grand jury, and if juries are to be authorized in effect, to give vent to their prejudices against those who claim the privilege, by rejecting the defendant's trial testimony simply because he had thus invoked the Fifth Amendment, it follows that the defendant's statutory privilege to testify at his trial has been encumbered, impeached and impeded. Thus, there is achieved the sinister dual derogation of both constitution and federal statute. The exercise of the constitutional privilege before a grand jury is burdened by subsequent penalty and a price—namely discredit at a subsequent trial—wrongfully exacted for its exercise. At the same time the statutory right of a defendant to testify at his trial

is rendered worthless to persons who have invoked their constitutional privilege before the grand jury. Thus, there is improvised, without constitutional or statutory warrant, and indeed in defiance of both constitution and statute, the requirement that a defendant *must* testify before a grand jury or forfeit the value of his right to testify at his trial! Yet the forums of grand jury and trial are so different, and the position of a defendant before indictment and after indictment so contra-distinguishable, that the very fundamental concept of a fair trial is undermined by the unwarranted condition and restrictions imposed by a rule permitting elicitation from a defendant that he had invoked his constitutional privilege and the discrediting of the defendant in unrelieved consequence.

II.

Due process was denied Halperin in consequence of the fact that he was subpoenaed to testify before a Grand Jury in an investigation of which he was a primary target and de facto defendant, particularly when his assertion of innocence before the Grand Jury and claim of constitutional privilege was effectively used to obtain his conviction (Question Presented 7).

The following quotation from the statement of Halperin's counsel made at the trial in support of a motion to dismiss the indictment, clearly shows that Halperin was in fact a primary target of the investigation of the grand jury which subpoenaed him and that he was a prospective defendant at the time he was called before the grand jury (696-698):

> "Mr. Singer: I ask your Honor for permission to make a motion in the absence of the jury.

In view of the Government's insistence upon examining Mr. Halperin concerning his testimony given before the grand jury, which was investigating the very facts upon which this indictment is based, and in view of the fact that the Government has offered at this trial proof that a hypothetical statement concerning all of the facts and circumstances testified to by the witness Davis at this trial was submitted to the United States Attorney conducting that grand jury investigation in Brooklyn; and in view of the other record facts which establish beyond doubt that the witness Marks, the witness Marjorie Segel, the witness Greenstein, the witness Tobias, the witness Berman, had all testified before the grand jury; and in view of the fact that each of these witnesses has said that his testimony, at least concerning the facts and incidents relating to the defendant Halperin, was the same as the testimony of each of these witnesses before the Court; and further in view of the fact that when counsel for the defendant Halperin in certain instances called upon the Court to examine certain of the grand jury testimony of these witnesses; and in view of the fact that the Court has held in the instances where such grand jury testimony was examined by the Court that the testimony was, to use I think the Court's word, consistent with the witness' testimony here, and therefore refused the defendants the right to inspect this testimony, it appears very clearly that the defendant Halperin was subpoenaed and compelled to appear before the grand jury not as a witness but as a prospective defendant. Under these circumstances, and directly in accord with the authorities which exist, it was improper, illegal and in violation of the defendant Halperin's rights to require him to answer, without having warned him of his rights; and, unless he consented to waive his rights and was willing to be called as a witness, under such circumstances no defendant or a prospec-

tive defendant may be under any circumstances compelled to testify before a grand jury.

Now, it further appears that the defendant Halperin, having been so subpoenaed and having refused to answer certain questions upon the ground of his constitutional privileges and rights under the Fifth Amendment, is now in the position of having those very rights offered before this jury as proof of some fact or circumstance in this case. The testimony Mr. Halperin gave before the grand jury cannot be used for any purposes.

It was impossible prior to trial to make any motion in this regard since we had no information that any of the evidence used before the Brooklyn Grand Jury had been used before the New York Grand Jury which returned this indictment. However, it now, as I have said, definitely appears beyond any contradiction that he, Halperin, was not a witness before the grand jury; he was being examined as a prospective defendant.

I might say that he and his indictment was the ultimate purpose of that investigation in Brooklyn, as is established here by the proof at this trial."

Thus, militating further to remove the Trial Court's rulings on the subject of the Fifth Amendment from conformity to the essential dictates of "appropriate judicial guidance" (*Bollenbach* v. *United States*, 326 U. S. 607, 615), is the fact that petitioner Halperin was the target of the Grand Jury investigation (696, 697, 698) not contested by Government). He was a "de facto accused" in the language of *United States* v. *Scully*, 2 Cir., 225 F. 2d 113. He should not have been called before the Grand Jury at all, since by doing so, the Government was seeking an unsanctioned examination before trial. In the *Scully* case, the Court wrote at page 116 of 225 F. 2d:

> "Indeed, one would suppose that, as a matter of ethics or fair play or policy, a prosecutor would in all cases refrain from calling as a witness before a Grand Jury any person who is *de jure* or *de facto* an accused. The absence of appeals to this court involving the problem under discussion would seem to indicate that some such rule or practice is observed in prosecutors' offices in this Circuit."

In *United States* v. *Blanton*, 77 F. Supp. 812, 816 the court wrote:

> "Complaint is made as to certain defendants that they were called before the grand jury and gave evidence upon which indictments were later returned against them. Such practice is not commended. It could be abused to a degree that would bar prosecution. Prosecuting officials should be careful to protect the constitutional rights of all citizens."

In *O'Connell* v. *United States*, 40 F. 2d 201, 207 (certiorari granted 281 U. S. 716, dismissed years later under Rule 35; 296 U. S. 667), the dissenting opinion states:

> "Calling a prospective defendant before a grand jury investigating a criminal proceeding has been severely condemned. Counselman *v.* Hitchcock, 142 U. S. 547, 12 S. Ct. 195, 35 L. Ed. 1110; Brown *v.* Walker, 161 U. S. 591, 16 S. Ct. 644, 40 L. Ed. 819; People *v.* Ferola, 215 N. Y. 285, 109 N. E. 500; People *v.* Gillette, 126 App. Div. 665, 111 N. Y. S. 133. To compel him to take an oath virtually compels him to be a witness against himself. People *v.* Ferola, *supra;* Brown *v.* Walker, *supra.*"

In the *United States* v. *Lawn*, 115 F. Supp. 674, 677 the Court stated:

> "However, upon the trial of the defendant in a criminal case, it would be a clear violation of a

defendant's right against self-incrimination under the Fifth Amendment of the Constitution to compel him to take the stand, testify and produce his records, relating to the matter with which he is charged. Unless he volunteers, it would invalidate the trial. United States *v.* Housing Foundation of America, Inc., 3 Cir., 1949, 176 F. 2d 665. Title 18 U. S. C. A. Sec. 3481 makes a defendant a competent witness *at his own request.* It is thus improper to call him as a witness without a request on his part. 8 Wigmore on Evidence, 3rd Edit., p. 393; 3 Wharton's Criminal Evidence, 11th Edit., p. 1960.

For similar reasons, an indictment is invalid if a defendant against whom a criminal information has been filed, is called by the prosecution as a witness before the grand jury to obtain evidence tending to sustain an indictment against him, which supersedes the earlier information. Mulloney *v.* United States, 1 Cir., 1935, 79 F. 2d 566; United States *v.* Miller, *supra;* United States *v.* Kimball, C. C., 117 F. 156. In neither situation is the defendant required to claim the privilege. The law grants him this protection. It is a right which he alone may waive."[9]

In *People* v. *DeFeo,* 308 N. Y. 595, 602, 603 (1955), the New York State Court of Appeals cites this Court's decision in *Counselman* v. *Hitchcock,* 142 U. S. 547, in support of the textual statement that

> "... if it could reasonably be said that the [grand jury] investigation was aimed at the witness himself, even though he claimed no privilege, his status as a prospective defendant was deemed sufficient to confer immunity automatically, ..."

[9] Lawn, Giglio and Livorsi were later tried together and convicted. The conviction was affirmed 232 F. 2nd 589, 2nd Circuit. Certiorari was granted October 15, 1956 (*Lawn* v. *U. S.,* No. 131; *Giglio and Livorsi* v. *U. S.,* No. 133—1956 Term. These cases both present a situation somewhat similar to our question 7. Inquiry discloses that argument in these matters may not be had this term of the court.

In *People* v. *Feroia,* 215 New York 285, 289, the Court stated:

> "The practice of calling the accused as a witness in the very proceeding in which the charge is being investigated cannot be too severely condemned. • • • In a proceeding before a committing magistrate, it is the right of the accused to make a statement not under oath, but said section requires that before he is called upon to determine whether to exercise that right he must be given certain information. That provision does not expressly apply to a case where the accused is called as a witness, for the very good reason that the statute does not contemplate such a violation of his constitutional rights. It is the calling of the accused as a witness, not merely the administering of the oath, which virtually compels him to be a witness against himself."

Furthermore, that the invocation of constitutional privilege at a preliminary proceeding, by a person who has been called as a witness in that proceeding—despite the fact that charges against that person were being investigated in the very proceeding—could not be used against such person at his subsequent trial was deemed fundamental law by the Court in the said case. The Court condemned the practice of not advising the prospective defendant-witness that his "refusal to testify could not be used against [him];" (p. 289 of 215 N. Y.).

Thus, it is respectfully urged, that if the fact that Halperin claimed his constitutional privilege before the grand jury which subpoenaed him constitutes evidence against him, then it follows that since the very act of subpoenaing Halperin, a *de facto* defendant, was a violation of his constitutional rights, that the evidence against him was illegally obtained, and under the well established rule in the Federal Courts is for that very reason inadmissable against him (*Weeks* v. *United States,* 232 U. S. 383, 393, 398).

However, whether an indictment may stand where the target of the grand jury's investigation was called before a grand jury and there gave testimony constituting evidence against himself, or whether a conviction based upon such self-incrimination is valid, or whether the self-incriminating evidence must be denied admission at the trial, are all questions which actually need not be adjudicated at this juncture.

Whether or not this court eventually decides that self-incriminating evidence elicited from a "*de facto*" defendant before a grand jury invalidates a subsequent indictment or that a conviction based thereon cannot stand it appears plain that the conviction should not be based upon an assertion of innocence accompanied by a claim of privilege made by a *de facto* defendant called before a grand jury.

It suffices that it appears generally acknowledged that "as a matter of ethics or fair play or policy, a prosecutor would in all cases refrain from calling as a witness before a grand jury any person who is *de jure* or *de facto* an accused" (*United States* v. *Scully*, 2 Cir., 225 F. 2d 113, 116, *supra*); for if added to the wrong inhering in the practice of authorizing a jury to discredit a defendant who invoked the Fifth Amendment before a Grand Jury, there be present the supervening element that the very act of calling him before the grand jury was a violation of "ethics or fair play or policy", then clearly a situation has arisen where this court in the course of its supervision of standards of procedure in federal courts—aside from constitutional doctrine—under the rationale of *McNabb* v. *United States*, 318 U. S. 332, should intervene and invalidate a conviction thus disfigured.

Halperin particularly had the right to invoke his privilege without subsequent penalty of discredit as a witness at his trial, in view of the super-added circumstance that

the government was seeking an unsanctioned examination before trial in questioning him.

(Compare, *United States* v. *Minker*, 350 U. S. 179, 196.)

* * * * * *

In conclusion, it need only be noted that the errors herein, (Arguments I and II) involving as they do, constitutional and statutory considerations, as well as appropriate judicial guidance to juries cannot be deemed merely technical.

Bruno v. *United States*, 308 U. S. 287;
Bollenbach v. *United States*, 326 U. S. 607, *supra;*
Dissenting Opinion, Vol. V, Appendix, p. 329a.

Moreover, as Judge Frank noted (footnote 4 *supra*) *"the jury could reasonably have acquitted"* Halperin, and hence the error herein could not be deemed harmless.

III.

The Court of Appeals opinion appears to affirm the conviction of Halperin on the corrupt influencing of witnesses counts upon evidence that he advised prospective witnesses who had ample justification to do so, to plead the Fifth Amendment. This is error (Question Presented 11).

The indictment did not charge Halperin with any such anomalous alleged offense as attempted corrupt influencing by advice to plead the Fifth Amendment. Counts 5, 6 and 7, charge attempted corrupt influencing by advising the prospective witnesses to give "fictitious, fraudulent, false and manufactured testimony".

A.

The Court of Appeals' opinion, on the other hand, appears to affirm the conviction of Halperin on the corrupt influencing of witnesses counts upon evidence of advice to prospective witnesses to plead the fifth amendment when the witnesses could do so with ample justification. The Court wrote (Vol. V, Appendix p. 315a):

> "The evidence adduced in support of Counts 6 and 7 describes attempts by Halperin himself to influence both Berman and Tobias. The substance of what Halperin said to both is reflected in the testimony of Berman that Halperin told him 'he felt he was going to stand on his constitutional rights and not do any talking. He wanted me to take the same stand, that I should not talk and stand on my constitutional rights. He mentioned the fact, that he had done me a good turn and that was the least I could do for him.'"

Halperin's testimony was, that in March, 1952, he did not call Berman, but Berman called him (665), and Berman said that Davis was down to see him the day before (666). Berman told Halperin that Davis had told him he was trying to make a deal with the United States Attorney in the Eastern District for immunity for himself and his partner, and that he wanted Berman to back him up by stating that the $60,000 had been paid as a fee (666). This was the first that Halperin knew that $60,000 had been involved in the package (666). Berman asked Halperin what he thought he should do and Halperin said that Berman should consult a lawyer and that "If you ask me as a lawyer, I would tell you to avail yourself of your constitutional privilege" (666). Halperin did not say that Berman had anything to fear by not talking (667), or that he, Halperin, had done Berman a good turn (667). Halperin never aided

and abetted anyone to get Berman to lie or impede justice (668). He had no dealings directly or indirectly with Tobias on March 15, 1952 (668). Halperin denied any conversation prior to Davis speaking to Marks.

Under Count Five, dealing with the influencing of Marks, there is no evidence that Halperin, himself, had any conversation with Marks with regard to his appearance before the Grand Jury, and no contention by the Government to the contrary. It is sought to hold Halperin in consequence of a discussion had by Halperin with Davis, Schopick and Hoffman, but all that was discussed there was a canvass of the sentiment of these defendants with regard to whether Davis' clients would plead their Constitutional privilege.

At first they felt that the clients would not talk and would plead their Constitutional privilege (361). Later, they became doubtful about this (362), and it was decided that Davis should communicate with Marks.

Fairly read, there is nothing in Davis' testimony with regard to these conversations which would warrant imputing to Halperin any intent that Davis should do more than merely ascertain his clients' intentions and perhaps to urge them to give further consideration to the advisability of their pleading their Constitutional privilege. Indeed, Davis' testimony shows clearly that his mission was merely one of inquiry and that he realized that there must be nothing said by him which could be used against him if Marks, as he expected, would report his conversation to the Grand Jury (363).

In *United States* v. *Herron,* 28 F. 2d 122, 123, D. C. Calif., the court held that it is not the law to make criminal the act of advising a witness to plead the Fifth Amendment where he is justified in doing so irrespective of the motive of the person so advising. The Court wrote:

"In the case of *Ex parte Irvine* (C. C. 1896) 74 F. 954, Circuit Judge Taft, now Chief Justice of the United States Supreme Court, in his decision said as follows: 'It is argued by counsel for the respondent that there was evidence before the trial court to show that the privilege was pleaded in bad faith, merely to save the defendants, and not to protect the witnesses from a prosecution of themselves. * * * We do not understand any of the American authorities to go so far as to hold that where, from the evidence and the nature of the question, the court can definitely determine that the question, if answered in a particular way, will form a link in the chain of evidence to establish the commission of a crime by the witness, the court should inquire into the motive of the witness in pleading his privilege.'

The witness himself, therefore, is protected in his claim of privilege by being allowed the privilege, irrespective of his motive for claiming the same.

In this case the defendant Herron is charged with influencing, by advising, the witness Rasmussen to claim a lawful privilege, and I do not believe it is the law or the policy of the law to make criminal, no matter what the motive might have been, the advising a witness to do that which was lawful and *would in fact* have protected the witness from disclosing self-incriminating matter." (Emphasis in original.)

In *United States* v. *Courtney*, 2 Cir., 236 F. 2d 921, 923, the majority opinion states:

"The government, in support of the judges order, argues thus: Since defendant initially explained that he refused to answer because the answers would impair his business and harm other persons, his subsequent refusal, on Fifth Amendment grounds, was in bad faith and, on that account, should be disregarded. We do not agree. If he was clearly entitled

to assert the privilege, his motives for doing so are immaterial. See Taft J. in Ex Parte Irvine C. C. 74 F. 954, 964-965, * * *."

The dissenting opinion concurs on the proposition that the matter of motive cannot invalidate an otherwise proper claim of privilege, but merely contends that the question of motive may cast doubt on the incriminatory nature of the question (p. 925 of 236 P. 2d).

In our case, the incriminatory nature of the questions as regards Berman, Tobias and Marks is established beyond possibility of doubt by the voluminous record, whereas in the *Courtney* case, which involved contempt proceedings for refusal to answer questions before the grand jury no trial transcript made their incriminatory nature clear.

In *Rosner* v. *United States,* 2 Cir., 10 F. 2d 675, it was held that it could not constitute obstruction of the administration of justice to induce a person not to answer a letter from the United States District Attorney requesting him to plead to an information, where the person so counselled had no legal obligation to obey the request.

In our case, too, there was no attempt to induce prospective witnesses not to comply with process, that is not to obey any subpoena to which they might be amenable, or not to tell the truth. The suggestion and advice related only to a matter where the witnesses had freedom of choice,—to plead the Fifth Amendment, or not to plead it, and in this sphere, upon the rationale of the *Rosner* case, *supra,* the influencing of witness statute was not operative (Compare, *United States* v. *Sprengel,* 3 Cir., 103 F. 2d 876, 883).

B.

Moreover, the language of the statute, making it a crime to corruptly influence witnesses (18 U. S. C., 1503),

although it may not be unconstitutionally vague under other circumstances and other contexts is too vague to constitute a basis for conviction under it where advice to claim the Constitutional privilege is involved. (Compare, *United States* v. *Cardiff*, 344 U. S. 174, 176; *Winters* v. *New York*, 333 U. S. 507.) Under such circumstances, the statute should be given a reasonable construction which will preserve its Constitutional definiteness (*United States* v. *Harriss*, 347 U. S. 612, 617, 618.) Applying this principle to our case, the statute must be denied extension to the act of advising a witness to claim his Constitutional privilege.

IV.

The Court of Appeals erred in holding that the Statute of Limitations did not bar prosecution of Halperin on the conspiracy charge. (Questions Presented 8, 9).

On this aspect of the case, not only did Judge Frank dissent on the application for rehearing and vote to grant all of the convicted defendants a new trial, but the prevailing opinion commented: "This is an interesting and important question, seemingly one of first impression" (Vol. V, appendix p. 299a).

Consideration of this contention is facilitated and focalized by a passage in the Trial Court's instructions to the jury supplemented by a concession made by the Government.

The Trial Court charged that the Statute of Limitations barred conviction of the defendants upon the First Count unless an overt act was committed within three years prior to the date of the indictment, that the indictment alleged that the conspiracy comprehended within it,

a conspiracy to conceal the true facts from investigation should investigation thereafter eventuate, and that to convict the jury must determine that the conspiracy did indeed comprehend a conspiracy to conceal and that an overt act to carry out such purpose occurred within the three year period (732).

This aspect of the Court's charge dovetailed with the Government's concession, made in the course of argument upon defendants' motions to dismiss at the end of the Government's case, that no overt acts other than concealment had occurred within the three year period prior to the date of the indictment (565).

The separate conspiracies in our case, having specific objectives, terminated when the objectives were accomplished. Thus, the Pattullo Modes criminal prosecution conspiracy allegedly involving Halperin, Grunewald and Bolich, terminated when word of no-prosecution was communicated to the Pattullo principals in January, 1949 (36, 37, 74, 226-230). The Gotham Beef conspiracy likewise terminated when the decision of no-prosecution was received by the Gotham principals in October, 1948 (147, 148, 153, 154, 165, 166, 185, 282, 325). These two account for the main-stream of the Government's proof, and in view of the direct evidence in the case, the date of termination of the conspiracy can be set with chronological accuracy.

The direct evidence in our case with its verbatim context of separate conspiracies precludes resort to inferences[10] to spell out a single conspiracy.

Conspiracies are deemed terminated when their objective is accomplished and this accomplishment of objective and end of conspiracy can be pinpointed, in our case, as to time and place. (*Krulewitch* v. *United States*, 336 U. S. 440,

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[10] *Guaranty Trust Co.* v. *Minneapolis & St. Louis R. R. Co.*, 8 Cir., 36 F. 2d 747, 757; *Consumers Power Co.* v. *Nash*, 6 Cir., 164 F. 2d 657, 659; 20 *Amer. Jur.* 163.

442, 443; *Lutwak* v. *United States*, 344 U. S. 604, 616, 617; *People* v. *McQuade*, 110 N. Y. 284, 308 (bribery conspiracy accomplished—not continued by co-defendant's alleged subornation of perjury at senate committee hearing); *United States* v. *Irvine*, 98 U. S. 450, cited in *Fiswick* v. *United States*, 329 U. S. 211, 216.)

In our case, it is clear, that the various conspiracies, or any conspiracy cognizable under the First Count of the indictment had terminated more than three years prior to the date of the indictment herein.

Any conspiracy with regard to dissuading the Pattullo Modes or Gotham Beef taxpayers from giving testimony before the Grand Jury or to dissuade them from speaking to Congressional Committee investigators, upon the record, had its genesis after the conclusion of the Pattullo Modes and the Gotham Beef conspiracies. (See Dissenting Opinion, on Petition for Rehearing, Vol. V, Appendix p. 389a.) There is no evidence that before the termination date of either of these conspiracies—of any single conspiracy embracing the Pattullo Modes or Gotham Beef cases—it was ever an object of the conspirators to dissuade the Pattullo Modes or Gotham Beef taxpayers from answering questions of the Congressional Committee investigators or from testifying before the Grand Jury. Indeed, there could not have been, for neither the Congressional Committee nor the Grand Jury were then in existence or even projected.

The Government's contention, that a subsidiary conspiracy to conceal survived the central criminal tax fraud objectives, is simply a re-statement of the Government's contentions, made and rejected in *Krulewitch* v. *United States*, 326 U. S. 440, 443, and *Lutwak* v. *United States*, 344 U. S. 604, 616.

The position of Halperin, and indeed that of the other convicted defendants, Grunewald and Bolich, has been that

the alleged conspiracy herein terminated in 1949 when the taxpayers received administrative assurance of no criminal prosecution.

Although Judge Frank, in his dissenting opinion upon the petition for rehearing does not entirely accept this contention and perceives in the evidence the possibility that the conspiracy herein encompassed the purpose of preventing prosecution of the taxpayers for tax evasion, subsequent to the no criminal prosecution administrative accomplishment, in 1949, Judge Frank nevertheless acknowledges that the jury "may well have found—and, for all we know did find—that the conspiracy ended in 1949, since the jury may have found that it was not a purpose of the conspiracy to prevent prosecution of the taxpayers for tax evasion after that date" (Vol. V, Appendix p. 388a).

Assuming that the jury did so find, Judge Frank proceeds to accept petitioner Halperin's contentions, in the following language (Vol. V, Appendix p. 389a):

> "Even so, such an overt agreement to conceal, made after 1949, could not reasonably serve to prove that the conspiracy, if it otherwise ended in 1949, had, before 1949, included an agreement—other than by implication from the mere existence of the conspiracy—to conceal the conspiracy after 1949. It could serve, at most, to prove a new conspiracy to conceal an older conspiracy. In that event (although such a new conspiracy would be evidence of the older conspiracy) the defendants could not, on such evidence, be convicted of the older conspiracy which ended in 1949, since the statute of limitations would have run against the older three years after 1949. See *U. S.* v. *Siebricht*, 59 F. 2d 976, 978 (C. A. 2) to the effect that an old conspiracy 'could not be revived by the breath of a new and different conspiracy * * *' The defendants were not indicted for such a new conspiracy, and the judge's charge

precluded a conviction based thereon. See, e. g., *U. S.* v. *Siebricht, supra.*

It follows that, if (1) the jury found—as it may have—that the conspiracy ended in 1949, it could not also reasonably have found (2) that the conspiracy included any understanding to conceal the conspiracy (in order to avoid detection and punishment for conspiracy) other than such an understanding implied in the mere fact of the conspiracy. The second of those findings would be bad, under *Krulewitch.* But the charge permitted the jury to render a verdict of guilty based on both such findings. I think the language in *Lutwak* cannot be stretched to sanction such a charge, and that therefore the charge was erroneous."

Judge Frank concludes that there could be no conviction on the basis on which the Court submitted the issue to the jury, because a conspiracy accomplished in 1949 could no longer be prosecuted.

A request that defendants must be acquitted if the conspiracy to obtain decisions not to prosecute had been finished in 1949 (Grunewald's Request No. 23, (771), was denied with exception (713); adoption by Halperin of Grunewald's Requests and Exceptions, Appendix (713)).

Questions presented Nos. 1, 2, 4, 5 in the Grunewald appeal (No. 183) and question presented No. 1 in the Bolich appeal (No. 186) correspond to our question presented No. 8 (Statute of Limitations); and question presented No. 2 on the aforesaid Bolich appeal corresponds to our question presented No. 9 (Multiplicity of Conspiracies) (984, 985, 987). Petitioner Halperin as already noted adopts the argument on the Grunewald appeal (No. 183) and the Bolich appeal (No. 186) on this subject of the statute of limitations, and multiplicity of conspiracies as it bears upon the statute of limitations point.

If this court holds that it was error to interrogate Halperin regarding his claim of constitutional privilege, or to charge the jury that they might discredit his testimony in consequence thereof, Halperin's conviction upon all counts, it is manifest, must fall.

Moreover, if this Court upholds Argument IV, *supra* that the Statute of Limitations barred prosecution of Halperin under the conspiracy count of the indictment (Count 1) then it follows that Halperin's conviction under Counts 5, 6 and 7,—the corrupt influencing counts—must likewise be reversed.

The vast bulk of the testimony related to the conspiracy count and if such testimony was erroneously received in that the Statute of Limitations barred prosecution or in that a prejudicial variance between a single conspiracy alleged and a multiplicity proved vitiated the prosecution, then it follows that Halperin's conviction under Counts 5, 6 and 7 was in all probability based upon a sheer bulk of inadmissible evidence and hence should be reversed (*Boyd* v. *United States,* 142 U. S. 450, 458).

Conclusion.

The conviction of appellant Halperin should be reversed.

Respectfully submitted,

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HENRY G. SINGER,
HARRY SILVER,
on the brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 184.

MAX HALPERIN,

Petitioner,

against

UNITED STATES OF AMERICA.

REPLY BRIEF ON BEHALF OF PETITIONER HALPERIN.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 184.

MAX HALPERIN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF ON BEHALF OF PETITIONER HALPERIN.

I.

The government takes the position that Halperin's testimony before the Grand Jury and the trial court was "*not irreconcilably conflicting*, they are different" (government's brief, p. 74). Later the government claims that Halperin's answers before the Grand Jury "*might or might not be inconsistent* with his protestations at the trial of complete innocence. It was * * * a different answer" (p. 75 of the government's brief). (Italics ours.)

Inconsistency not a mere difference is required to warrant cross examination as to prior statements. "Thus, it is not a mere difference of statement that suffices; nor yet is an absolute oppositeness essential; it is an inconsistency that is required" (III Wigmore on Evidence, 3rd Ed. Sec. 1040).

The acknowledgment that Halperin's claim before the grand jury *might not be inconsistent* destroys the very foundation for the right of the government to refer to it at all. Particularly must this be so when it is so manifest that the entire exposition of the inconsistency complex herein was colorable and only intended to serve as a vehicle for bringing upon Halperin's head the opprobrium of the jury not for some dubious inconsistency but for claiming the Fifth Amendment.

Moreover, no cross examination of Halperin was necessary to exclude inconsistency. The government already knew that Halperin was justified in claiming his privilege before the grand jury—that the claim was not perjurious. The government knew also that the grand jury minutes disclose that Halperin had told the grand jury that he was innocent and that he was invoking the Fifth Amendment because he had no right to cross examine witnesses and on advice of counsel (705-707).

Thus the government cannot fairly claim that it did not know prior to this cross examination of Halperin whether or not the vital factor of inconsistency existed. It did know. It knew that the factor was non-existent but nevertheless proceeded to stigmatize him as a Fifth Amendment defendant.

The government acknowledges that our request to charge "an innocent man may honestly claim that his answers may

tend to incriminate him" was "probably correct" (p. 42 of government's brief) and later states that "this court has recognized that this is a correct statement" citing the *Slochower* and *Ullmann* cases (government's brief, p. 83). Yet, the government does not explain why the trial court omitted all mention of Halperin's explanation for claiming the constitutional privilege before the Grand Jury. The jury's attention was completely diverted from all of Halperin's explanations with respect to his Grand Jury testimony, but attention was only focused on his claim of the privilege under the Fifth Amendment. Not a word appears in the court's charge to the effect that Halperin had testified before the Grand Jury that he was claiming the privilege as an innocent man and that before the Grand Jury he did not have the right to cross examine witnesses, to be confronted by the witnesses and that he was acting upon advice of counsel.

Even if there were some aspects of Halperin's explanation which the jury did have the right to disbelieve, the Court should have advised the jury that only if they disbelieved the defendant's evidence with respect to such explanation, might they consider his prior failure to testify against him on the score of credibility. (See, *Tatum* v. *United States* (Court of Appeals, Dist. of Col.), 190 F. 2d 612, 617.)

Moreover, it was a vital theory of the defendant Halperin's case supported by Halperin's detailed testimony, that in asserting his privilege of self-incrimination before the Grand Jury, he was acting as an innocent man and was invoking the protection that the Constitutional guarantee affords and is entitled to afford to an innocent person, and indeed, had so told the Grand Jury. This, itself, entitled defendant, Halperin, to the charges requested.

In *Marson* v. *United States*, 6 Cir. 203 F. 2d 904, 912, the Court stated:

> "With respect to a charge on the theory relied upon, it is the law that where a defendant in a criminal case presents a theory supported by the evidence and the Court's attention is particularly directed to it, it is reversible error to refuse to give a charge on such a theory."

Again, it was held in *People* v. *Lupa*, 305 N. Y. 448, that a charge is inadequate and fails of its purpose where it leaves the jury uncertain as to the law applicable to any part of the case. Furthermore, as stated in *People* v. *Levine*, 265 App. Div. 513, 39 N. Y. S. 2d 938, 939, 940, citing *People* v. *Odell*, 230 N. Y. 481, 487, and *People* v. *Kinney*, 2[illegible] N. Y. 389, 397:

> "The Court's charge 'should be a safeguard of fairness and of partiality and the guarantee of judicial indifference to individuals.' "

It may be noted at this juncture that the government's brief does not even attempt to controvert the claim in our main brief, that "* * * even if the government could initially inquire into the subject, Halperin's answers were productive of no basis, under the Raffel doctrine, for the trial court to invite the jury to disbelieve Halperin's testimony in chief." (Our main brief, p. 27).

We noted in support of this contention that this court, in the *Raffel* case, had taken occasion to specify that only if interrogation regarding Raffel's failure to testify at his first trial had produced evidence of discrediting motive might the jury deem his credibility impaired (p. 498 of 271 U. S.). We urged that since Halperin's trial testimony was shown to be entirely consistent with his course of conduct

before the Grand Jury that the condition precedent to impairment of credibility was non-existent and the court's charge vitally erroneous. Nowheres in its brief, does the government question our aforesaid views of the proviso in the *Raffel* case regarding credibility and the impact favorable to Halperin of the delimitation.

Moreover, the government's brief fails to impair the validity of our position that the very act of bringing to the jury's notice that Halperin had claimed the Fifth Amendment, thereby arousing the jury's prejudice against him, was itself an infringement upon the dictates of fair and impartial procedure which should govern the trial of a criminal case in the Federal Courts.

II.

We respectfully call the court's attention to what we believe is an inconsistency in the government's brief. At pages 87 and 88 the government argues that the Brooklyn Grand Jury did not know the identity of the "Washington associate." Yet, at page 35 of the government's brief the testimony of Nancy Hain, Grunewald's personal secretary is referred to and there it appears that Miss Hain was "subpoenaed to appear before the Grand Jury on * * * May 13, 1952." This was the Brooklyn Grand Jury. The record shows that Miss Hain "went to the United States Attorney's Office in Brooklyn where she spoke to 'Mr. Parker and Mr. Kennedy and Mr. Percy' and she answered questions" they put to "her" (p. 533-534). It is thus obvious that the Brooklyn Grand Jury knew that Grunewald was the so-called "Washington associate." In addition, although it does not appear in the record, petitioner Grunewald was himself subpoenaed before the Brooklyn Grand Jury.

It, therefore, appears that the Brooklyn Grand Jury did not need Halperin's testimony to identify the "Washington associate." The net result must be that Halperin was a target of that Brooklyn Grand Jury.

Respectfully submitted,

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HENRY G. SINGER,
HARRY SILVER,
on the brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 186

DANIEL A. BOLICH,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. .....

DANIEL A. BOLICH,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Daniel A. Bolich, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming judgments of conviction of conspiracy to defraud the United States in violation of 18 U. S. C. § 371 and 26 U. S. C. § 4047 (e) (4) after a trial in the District Court for the Southern District of New York, except as to the fine of $5,000 imposed on petitioner Bolich for violation of 26 U. S. C. § 4047 (e) (4), which fine was set aside.

Petitioner was convicted together with two co-defendants, Henry W. Grunewald and Max Halperin, who were each found guilty of conspiracy (18 U. S. C. § 371). Halperin was also convicted on other counts. Petitioner Bolich was sentenced to imprisonment for five years and

fined $10,000 on Count I, and three years imprisonment and fined $5,000 on Count II, such prison sentences to run concurrently.

When the case was first before the United States Court of Appeals, that Court rendered a decision unanimously affirming the judgments of conviction as to petitioner and co-defendant, Grunewald. Frank, Circuit Judge, dissented solely as to the co-defendant, Halperin. On petitions for rehearing, Frank, C. J., dissented from the denial thereof and voted to reverse and grant a new trial as to all the defendants.

The record in this case as printed for the use of the Court below (which included the joint appendix of co-defendants, Grunewald and Halperin; the separate appendix on behalf of the petitioner, Bolich; and the Government's appendix) together with such additions as are necessary to show the opinions and proceedings in the United States Court of Appeals, are filed herewith in accordance with the Rules of this Court.

Opinions Below

The majority and first dissenting opinions of the Court of Appeals were filed April 10, 1956. The case has not yet been officially reported.

On petitions for rehearing or to stay the issuance of the mandate and to continue bail, the petitions for stay of mandate and continuance of bail as to each of appellants were granted, but the petitions for rehearing were denied by a divided Court, Judge Frank dissenting in an opinion as to the petitions for rehearing and voting for reversal and ordering a new trial for all the defendants. The opinion on the petitions for Rehearing has not yet been officially reported. The opinions referred to are printed in a separate appendix (Volume V, Appendix, pp. 288A to 357A; 380A to 393A).

Jurisdiction

The judgment of affirmance by the United States Court of Appeals was entered on April 10, 1956. A timely petition for a rehearing was duly filed on April 24, 1956 within the fifteen days allowed by Rule 25 of the Rules of that Court and was denied by order dated and entered June 1, 1956 (Judge Frank, dissenting as to all defendants).

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1) and Rule 37 (c) of the Federal Rules of Criminal Procedure.

Questions Presented

1. Whether the three year Statute of Limitations, applicable to the charge of conspiracy, barred conviction of the petitioner Bolich inasmuch as the objective of the alleged conspiracy had been achieved by January, 1949—more than five years before the date of the indictment which was filed on October 25, 1954.

2. Whether multiple conspiracies were established by the evidence, rather than a single general conspiracy, to the substantial prejudice of the rights of the petitioner Bolich.

3. Whether the Court below erred in overruling petitioner Bolich's contention that the evidence failed to connect him with any conspiracy and in the entire record there can be found no substantial evidence that is not consistent with his innocence.

4. Whether the trial Court committed prejudicial error in refusing to strike out the testimony of Everett Harding and Daniel Olsen.

5. Whether the trial Court committed prejudicial error in allowing the government witness Davis to rehabilitate his own testimony by proof of a previous hypothetical statement allegedly made by his attorney.

6. Whether the trial Court committed prejudicial error in permitting the government to elicit from the defendant Halperin upon his cross-examination that he had invoked the Fifth Amendment at a Grand Jury hearing and the trial Court charged the jury that they might consider Halperin's claim of constitutional privilege as adversely affecting his credibility.

Statutes Involved

18 U. S. C. § 371. *Conspiracy to Commit Offense or to Defraud the United States*

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both."

26 U. S. C. § 4047 (e) (4).

§ 4047 (e) *Other Unlawful Acts of Revenue Officers or Agents*

"Every officer or agent appointed or acting under the authority of any revenue law of the United States • • •

(4) Who conspires or colludes with any other person to defraud the United States; • • • shall be dismissed from office, shall be fined not less than $1,000. nor more than $5,000., and be imprisoned not less than six months or more than three years. • • •"

Statement of the Case

On October 25, 1954, an indictment was returned in which petitioner, Daniel A. Bolich, former Assistant Commissioner of Internal Revenue, was named as defendant together with seven others. The jurisdiction of the District Court was invoked because the case arises under the United States Criminal Code.

The indictment contained seven counts (Grunewald Halperin-Appendix, 5-19).* *Count I* on which petitioner was convicted alleged that beginning on or about January 1, 1946, and continuing up to and including the date of the filing of the indictment (October 25, 1954), all defendants, together with others named as co-conspirators but not indicted, conspired, in violation of the general conspiracy statute, to defraud the United States in the administration of the revenue laws and to influence witnesses before a grand jury and before a congressional investigating committee and charged that defendants and co-conspirators would make continuing efforts to avoid detection and prosecution through the use of any means whatsoever and generally obstructing justice. Thirteen overt acts were alleged, of which one concerned petitioner (10) as follows:

> "8. On or about December 20, 1951, within the Southern District of New York, the exact place to the Grand Jury unknown, defendant DANIEL A. BOLICH had a telephone conversation with one Everett Harding."

The *second count* also charged Bolich, Steinberg and Scherm, as employees of the Internal Revenue Bureau

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* References, unless otherwise indicated, are to the pages in the joint appendix of Grunewald and Halperin. References to appellant Bolich's appendix in Court of Appeals are designated as "Bolich App."

with a conspiracy to defraud the United States in violation of 26 U. S. C. § 4047(e)(4) and is precisely the same as charged in the first count (11-14). Growing out of the same transaction alleged in the first count, the second count covers exactly the same period of time involved in the first count.*

The *third count* was disposed of by granting petitioner's motion for judgment of acquittal at the close of the Government's case. The *fourth count* was dismissed before trial on consent of the government. The trial Court also granted motions by defendants Bolich and Grunewald for judgment of acquittal as to the *fifth, sixth and seventh counts* which alleged in substance that the defendants did unlawfully endeavor to influence witnesses in March, 1952, to give false testimony and to obstruct justice concerning certain income tax fraud investigations being conducted by a Brooklyn Grand Jury (583).

The record of this joint trial is voluminous extending over 5,400 pages. The evidence upon which the government relied to establish the offenses charged in the indictment against the defendants was as to each of the defendants different and in large measure wholly disconnected. Yet, in the great mass of the testimony, there is not a shred of evidence which links the petitioner Bolich with any conspiracy or that he participated therein or had any knowledge thereof. The government's case against him is based entirely upon circumstantial evidence. We shall confine our statement to such facts as are material to the questions presented as required by Rule 23(1)(e), for obviously we cannot cover the case completely within limits reasonable for a petition for certiorari.

The government proceeded upon the theory that the alleged conspiracy involved the corrupt and illegal dis-

* Defendants Steinberg and Scherm were acquitted.

position of two separate tax cases, namely *Pattullo Modes, Inc.*, a dress manufacturing company, and *Gotham Beef Co.*, a meat firm, which were under investigation in 1948 by the Internal Revenue Department. Both of these companies were clients of the law firm of Schopick & Davis who were named as defendants in the indictment, but were granted a severance of the trial upon the government's motion.

I

The *Gotham Beef* case was one of the cases which had been assigned for review in April, 1948, to Herman F. Kuehl, employed by the Internal Revenue Service in New York. His duties were to prepare reports and recommendations in such cases in conformity with Bureau policy and to hold conferences on settlements (277). Bolich was then Special Agent in charge of the Fraud Bureau employing about 150 agents at that time (285). In July, 1948, Bolich telephoned Kuehl that Davis was in his office concerning the *Gotham Beef* case, contending that over-ceiling purchases and over-ceiling sales washed out each other and that Davis had checks and invoices to support his client's claim that there was no tax evasion (278). When Davis outlined the claims advanced on behalf of his client, Bolich advised him to "submit everything to (the conferee) Mr. Kuehl" (320).

Kuehl thereafter arranged a conference with Davis for August 16, 1948, which was attended before him by Davis, Special Agent Mullenbach, one of the members of the Gotham Beef Company and their accountant (280, 282).

Kuehl requested Davis' cooperation in submitting net worth statements relating to the principals of the company (282).

After that conference was concluded, Kuehl instructed Special Agent Mullenbach to submit a supplemental report after he had completed his further investigation (283).

Subsequently, Mullenbach recommended criminal prosecution in his supplemental report, which Kuehl reversed after conferring with his immediate superior, Mr. Baradel, head of the Conference and Review Section at the special agent's office (283, 476). Both Kuehl and Baradel agreed that it was "a very weak case" (283-4). Petitioner Bolich then was no longer the agent in charge at the New York office, having left to take up his duties in Washington (271, 286).

Kuehl notified Davis on October 28, 1948, that the *Gotham Beef* case would be closed for civil settlement, with no criminal prosecution, but with the imposition of a civil fraud penalty (284).

Kuehl declared that petitioner Bolich did not request him to do anything improper in the case and that Kuehl's decision was based on his own best judgment (285-6).

Walter Murphy was the acting agent in charge in October, 1948, and the reversal of Mullenbach's supplemental report was affirmed by Mr. Murphy (R. 2130-2).

The purpose of the alleged conspiracy as testified to by Mr. Tobias in the *Gotham* Beef case was stated as follows:

> "Now, the exact terms of the escrow * * * was * * * that until I were to have heard with my own ears from the special agent's office from a responsible official that there was to be no criminal prosecution in the Gotham matter, * * * the money was not to be released" (167).

II

Davis testified with respect to the *Pattullo Modes* case that he consulted with Mr. Schwaeber, an attorney, in September or October, 1947, to retain him as counsel when the case went to the special agent's office, of which Bolich was then the agent in charge (308). According to Davis, Schwaeber said he was not sure that he would like to rep-

resent the taxpayers because his relationship with Bolich was not of the best, but he expected to form a law partnership with James Saver and he knew that Saver's relationship with Bolich was far better (309).

Davis went on to say that Saver told him in March, 1948, that he had discussed the matter of a voluntary disclosure with Bolich, who replied that he did not believe a voluntary disclosure had been made (311).

Davis testified that Halperin told him to tell Saver to see Bolich in Washington (332). Mr. Saver went to Washington and reported back to Davis in November, 1948 that Bolich said to him:

> "• • • if the taxpayers cooperated fully and developed all of their income that he would recommend that the case be given a no-prosecution consideration" (332).

Mr. Baradel testified that on January 5, 1949, Bolich telephoned him regarding the *Pattullo Modes* case. Baradel advised him that he had ruled against the taxpayers on their claim of voluntary disclosure (476). Bolich agreed that although his (Baradel's) decision was technically correct he had decided after a visit from Saver and Quinn (attorneys representing *Pattullo Modes*) that if the taxpayers gave full cooperation to the agents, the case ought to be closed on a non-prosecution basis (476). Bolich told Baradel he was taking full responsibility for this action and said "let the record show it" (485).

At the meeting in Baradel's office on January 10, 1949, Mr. Saver called attention to Bolich's promise and after Baradel learned that full cooperation had been given by the taxpayers, he declared that he would close the case against them without prosecution, but with a 50 per cent penalty (334, 478).

Baradel further testified that he had determined definitely against prosecution and he reached that decision

honestly in the exercise of his best judgment and discretion (491, 6, 7).

The purpose of the alleged conspiracy in the *Pattullo Modes* case was thus stated by Mr. Marks, one of the principals connected with that concern:

> "He [Davis] says all he could promise us that there would be a memorandum put into our file that the case was to be settled on a civil basis" (36).

III

On the motions made by defendants for judgment of acquittal at the close of the Government's case, the Government conceded that there was no claim of any overt acts within three years prior to the indictment other than the acts relating to so-called alleged concealment (579).

Insofar as Bolich is concerned, the overt act with which he is charged in the indictment, related to a telephone conversation had on or about December 20, 1951, with one Everett Harding (10).

Harding, Assistant Manager of the Hotel Washington, Washington D. C. testified, among other matters, that in the summer of 1950, Bolich requested his hotel bills for approximately a year back so that he might review them (Government's App. 165a). About a month or two later, Harding handed a compiled record of bills to Bolich, which did not include voucher records such as long distance telephones and restaurant charges (Gov'ts. App. 165-6a). Harding claimed that the records were never returned to him (Gov'ts. App. 166a). In December, 1951, when the King Committee subpoenaed these records, the hotel management requested Bolich to return them. (Gov'ts. App. 166-7a). On December 20, 1951, Bolich telephoned Harding and we quote from the record:

> "Q. What did he say? A. The substance of the call was that Mr. Bolich said he had not received the rec-

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No. 186

Supreme Court of the United States

OCTOBER TERM, 1956

DANIEL A. BOLICH,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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ords—let us see now, it has been so long ago, sir, I am sorry, I will do my best—he had not received the records, that he had been in bed with a bad heart * * *" (Gov'ts. App. 169a).

Harding had no clear recollection of this conversation and sought to refresh his memory by the use of a memorandum (Gov'ts. App. 169-170a). He then modified his testimony as follows:

"Mr. Bolich said he did not receive the records, and later in his conversation said he simply did not remember ever having received them; that if he had, he knew he had not taken them from the office or away from the office; that it could have been that he might have laid them on Mr. Rhodes' desk [Executive assistant manager of the hotel] or something of the sort there, that he knew he had never taken them away from the office" (Gov'ts. App. 170-1a).

Bolich told him there must be other records and if the hotel had its voucher records, they could reconstruct their bills from that (Gov'ts. App. 171-2a).

On cross-examination, Harding stated that all voucher records were destroyed by the hotel every two years, and larger bills were kept five years (Bolich App. 824). These records were discarded in the usual course of business and was not done at Bolich's request (Bolich App. 824).

Daniel Olsen, a carpenter, testified that on September 28, 1950, he did a very small carpentry job at Bolich's home in Brooklyn (553). Bolich asked him to open up the baseboard in a clothes closet in the upstairs room for a compartment that could be used to put some papers away (553). The base was about 8 inches wide and the moulding 2 inches wide, so that the opening would be about 10 inches (554). He said Bolich told him it was to be a hiding place for secret Washington papers (555).

On cross-examination he said that Bolich did not tell him that he had a home elsewhere than in Brooklyn and that Mr. and Mrs. Bolich left the house alone for quite some period of time (Bolich App. 826).

Reasons for Granting the Writ

This Court in the exercise of its judicial discretion ought to grant this petition for a writ of certiorari for the special and important reasons set forth below:

1. Concerning the issue of the Statute of Limitations.

In the majority opinion below, it is stated that the question of the Statute of Limitations urged as a bar to the prosecution herein by the appellants "is an interesting and important question, seemingly one of first impression" (Vol. V, App. p. 299a)* Because of a serious error in the trial Court's instructions on that issue, Judge Frank dissented on the petitions for rehearing and voted to grant a new trial for all the defendants (Vol. V, App. 381a-393a).

It is clear that the object and purposes of the alleged conspiracy ended in the *Pattullo* case on or about January 12, 1949 (overt act, No. 2, Grunewald App. 10) and in the *Gotham* case sometime between October 27, 1948, and November 9, 1948 (overt act No. 5, Grunewald App. 10). The indictment herein was filed October 25, 1954. The Statute of Limitations was, therefore, a complete defense to the prosecution and an insuperable obstacle in the government's way, because the three-year period under the general conspiracy statute barred any prosecution. To save the case from the bar of the statute, the prosecution ingeniously attempted to make part of an earlier alleged

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*Grunewald and Halperin are also filing separate petitions for certiorari.

conspiracy in 1946, an alleged later conspiracy in 1951-2, which could not possibly have been a part of it and by this transparent means and contrivance to emasculate the Statute of Limitations.

The argument on this question is dealt with so comprehensively by counsel for the petitioners Grunewald and Halperin, that we urge that their contentions made on this vital issue be considered with the same force and effect as if restated here, since it is also applicable to petitioner Bolich.

In brief, the decision of the Court below is in conflict with applicable decisions of this Court in *Krulewitch* v. *United States,* 336 U. S. 440, and *Lutwak* v. *United States,* 344 U. S. 604. The trial judge charged that the Statute of Limitations on count 2 was five years (759). Bolich contended before the Court below that counts 1 and 2 charged identical offenses and that, hence, the verdict of guilty under both counts convicts him twice of the same offense.

As we have stated, the Court below unanimously set aside the fine of $5,000 imposed on Bolich under count 2. If the fine was invalid, we respectfully submit that the Court below should also have vacated the judgment of conviction under count 2 and the sentence as to the imprisonment under count 2 should have been adjudged void, for the one cannot be separated from the other (*Snitkin* v. *United States,* 265 Fed. 489 (C.C.A. 7). In 24 C. J. S. Criminal Law, § 1990, it is said:

> "The constitutional principle that no one shall be put in jeopardy twice for the same offense, is broad enough to mean that no one can be lawfully punished twice for the same offense; the one follows from the other, and the constitutional provisions are designed to protect accused from a double punishment as much as to protect him from two trials."

2. On the question of multiple conspiracies.

The trial herein was "conducted * * * on the assumption that it was immaterial whether the proof showed one conspiracy with which all of the defendants were connected, or separate conspiracies with which some, but not all of them were" (*Brooks* v. *United States,* 164 Fed. 2d 142 (C. C. A. 5)).

This case points up vividly the evils of the single-count conspiracy indictment discussed by Mr. Justice Jackson in his concurring opinion in *Krulewitch* v. *United States,* 336 U. S. 440, 445-6*.

Upon the trial, Bolich's counsel joined in the motions seeking a dismissal of the First Count upon the ground of variance between the pleadings and the proof (558, 561).

The case at bar clearly falls within the principle of *Kotteakos* v. *United States,* 328 U. S. 750, and the decision of the Court below is directly in conflict therewith. It is also in conflict with *United States* v. *Siebricht,* 59 Fed. 2d 976 (C. A. 2).

3. On the question of Bolich's motion for judgment of acquittal.

The whole case against Bolich hung on one single gossamer thread of suspicion—his friendly acquaintanceship with Grunewald—a mere circumstance sufficient at best to

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* The Court below in its majority opinion (Vol. V., App. 303a) stated:

> "The record contains ample proof of efforts by the conspirators to forestall suspicion and wipe out traces of their efforts developed later and in 1951 and 1952 into an intensified campaign of concealment, the details of which will be referred to briefly in connection with the charges against Halperin in Counts 5, 6 and 7."

There is not a particle of evidence which in any way links petitioner Bolich with the charges in Counts 5, 6 and 7, *on which Bolich was acquitted by direction of the trial court* (583).

create only a surmise, guess or conjecture of any conspiracy. There is no evidence from which any inference could be drawn that Grunewald ever mentioned the *Pattullo* or *Gotham* or any other case to Bolich. There is no evidence from which any inference could be drawn that the conduct of Bolich was unlawfully and corruptly influenced by anyone. There is no evidence from which any inference could be drawn that Bolich acted together with anyone with a common unlawful design and for a common corrupt purpose, or that he benefited therefrom.

As a matter of law, the circumstantial evidence did not authorize the inference of critical facts from which the conclusion of guilt was drawn. Those facts were not proved, but were left to conjecture. Particularly applicable here is what was said by Cardozo, J., in *People* v. *Galbo*, 218 N. Y. 283, 294:

> "* * * conjecture has filled the gaps left open by the evidence and the presumption of innocence has yielded to a presumption of guilt."

We are well aware that the weight of conflicting testimony was neither for the trial judge nor the appellate court. But we do maintain that considering all the evidence in the light most favorable to the prosecution and unfavorable to petitioner Bolich, that the trial judge erred in denying his motion under Rule 29 of the Federal Rules of Criminal Procedure for a judgment of acquittal upon the ground that the evidence so far as Bolich is concerned was insufficient as a matter of law, to sustain a conviction (Bolich App. 22-4).*

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* *Rule 29—Federal Rules of Criminal Procedure*, provides:

"(a) *Motion for Judgment of Acquittal.* * * * The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. * * *"

4. As to motions to strike out testimony.

At the close of the case, counsel for Bolich moved to strike out the testimony of Everett Harding, Assistant Manager of the Hotel Washington, upon the ground that there was no substantial evidence to show that even if a conspiracy existed, the telephone conversation in December, 1951—alleged as an overt act in Count I—was in furtherance of such conspiracy. The motion was denied and exception noted (Bolich App. 828-30). The record shows that Bolich and his wife first registered at the Washington Hotel on September 7, 1948 (R. 3220). Harding testified as to Bolich's continued occupancy there to April, 1951 (510, 520-1, Gov't. App. 177A-178A). Harding produced the hotel records consisting of copies of bills rendered to Bolich relating to such residence for the entire period mentioned.

The so-called "missing records" consisted of bills rendered to Bolich from June, 1949, to June, 1950, for valet services, laundry and similar items, but did not include such voucher records as long-distance telephones and restaurant charges (Gov'ts. App. 165A-166A).

The government avidly seized upon the alleged "missing records" and Bolich's telephone call to Harding in December 1951 as the sole overt act charged against him in the indictment. The record is clear that Bolich's occupancy at the hotel was known and recorded at all times and was never concealed (see Gov'ts. Exhibit 62). Items concerning Bolich's valet services, laundry etc. and Bolich's phone call to Harding in December 1951 could not have had the remotest connection in furtherance of the alleged conspiracy.

Harding's testimony was not related to the conspiracy alleged and had no tendency whatever to support the charge. It permitted the jury however, to draw the inference that the telephone call was an overt act done to effect the object of the conspiracy though there was no

evidence to sustain such a finding. The jury should not have thus been licensed to make a conjecture upon a ground that had no evidentiary basis.

Bolich's counsel also moved to strike out the testimony of Olsen, the carpenter, to which we have already referred in our statement of the case (Bolich App. 830). The motion was denied and an exception taken (Bolich App. 830).

In *People* v. *Van Aken*, 217 N. Y. 533, where a judgment of conviction—as in Bolich's case—rested on circumstantial evidence, Judge Cardozo, writing the opinion for reversal, concluded as follows:

> "The line was not drawn between inference and conjecture, between legitimate deduction and unregulated suspicion."

Similarly, in the case at bar, the jury was permitted to find by means of the merest guesswork that Bolich was connected with the conspiracy charged. The motions to strike out the testimony of Harding and Olsen should have been granted. Such testimony was without any probative value whatever and was injected as a sham and pretense to circumvent the Statute of Limitations and to extend the bar of the statute indefinitely.

5. As to the trial Court's ruling in allowing Davis to rehabilitate his own testimony by proof of a prior hypothetical statement made by his attorney.

This vital question is considered most exhaustively in the petitions which will be filed on behalf of Grunewald and Halperin. It would therefore serve no useful purpose to repeat the arguments therein contained, which we adopt in all respects.

6. As to the cross-examination of the defendant Halperin on his claim of privilege against self-incrimination and the Court's charge on that subject.

The original dissenting opinion of Judge Frank raises a most serious constitutional question especially in the

light of the recent decision handed down by this Court in *Slochower v. Board of Higher Education*, 350 U. S. 551.

The invasion of the defendant Halperin's constitutional rights, coupled with the trial judge's instruction that the jury might consider his assertion of his constitutional privilege as affecting the credibility of his other testimony at the trial, necessarily affected and prejudiced the petitioner Bolich as well as Grunewald, because he was the only witness for this group of defendants.

If Judge Frank is right in his original dissenting opinion, and the rationale of the *Slochower* case, *supra*, applies, then the conclusion is inescapable that the challenged ruling and instruction was erroneous and rendered impossible a fair and objective consideration of the evidence against petitioner Bolich by the jury. The jury's verdict could well have been influenced by this serious error. The record shows that all counsel vigorously protested the trial judge's ruling and instruction on this subject and moved for a mistrial (696, 697-8, 702-5, 776-9).

This question alone is far reaching in its application and importance in the administration of the criminal law and should be settled by this Court, as indicated in Judge Frank's original dissenting opinion.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

June 18, 1956.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1956

No. 186

DANIEL A. BOLICH, *Petitioner,*

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The majority and dissenting opinions in the Court of Appeals are reported in *United States* v. *Grunewald, Bolich, and Halperin,* 233 F. 2d 556.

On petitions for rehearing or to stay the issuance of the mandate and to continue bail, the petitions for stay of mandate and continuance of bail as to each of the above named appellants were granted, but the petitions for rehearing were denied by a divided Court, Judge Frank dissenting in an opinion, reported in 233 F. 2d 556, at pp. 592-598, as to the petitions for rehearing and voting for reversal and ordering a new trial for all the defendants.

The opinions referred are printed in Vol. V Appendix as follows: the original majority opinion is printed at pp. 288a-316a; the original dissenting opinion of Judge Frank, at pp. 316a-357a; and the further dissenting opinion of Judge Frank on the denial of the petitions for rehearing at pp. 380a-393a.

Jurisdiction

The judgment of affirmance by the Court of Appeals (except as to the fine of $5,000 imposed on petitioner Bolich) was entered on April 10, 1956 (Vol. V App., p. 358a). A timely application for rehearing was made by petitioner on April 24, 1956 and was denied on June 1, 1956, Judge Frank dissenting from the denial thereof and voting to reverse the conviction of all the defendants and to grant them a new trial (Vol. V App., p. 394a). The petition for certiorari on behalf of Bolich was filed on June 21, 1956. Grunewald and Halperin also filed separate petitions for certiorari. This Court granted limited certiorari to all the petitioners on October 15, 1956 (R. 984-988). The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1) and Rule 37 (c) of the Federal Rules of Criminal Procedure.

Statutes Involved

18 U.S.C. § 371. *Conspiracy to commit offense or to defraud United States*

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both." • • •

26 U.S.C. § 4047 (e) (4).

§ 4047 (e). *Other unlawful acts of revenue officers or agents*

"Every officer or agent appointed and acting under the authority of any revenue law of the United States — • • •

"(4) Who conspires or colludes with any other person to defraud the United States; • • • shall be dismissed from office, shall be fined not less than $1,000 nor more than $5,000, and be imprisoned not less than six months nor more than three years. • • •."

Questions Presented

The order granting certiorari limited the questions as to the petitioner Bolich to those enumerated below (R. 984, 987):

No. 186

"1. Whether the three year Statute of Limitations, applicable to the charge of conspiracy, barred conviction of the petitioner Bolich inasmuch as the objective of the alleged conspiracy had been achieved by January, 1949—more than five years before the date of the indictment which was filed on October 25, 1954.

2. Whether multiple conspiracies were established by the evidence, rather than a single general conspiracy, to the substantial prejudice of the rights of the petitioner Bolich.

6. Whether the trial Court committed prejudicial error in permitting the government to elicit from the defendant Halperin upon his cross-examination that he had invoked the Fifth Amendment at a Grand Jury hearing and the trial Court charged the jury that they might consider Halperin's claim of constitutional privilege as adversely affecting his credibility."

Statement of the Case

The petitioner Bolich was convicted of the crime of conspiracy (Title 18, U.S.C. § 371 and 26 U.S.C. § 4047 (e) (4) after a trial in the United States District Court for the Southern District of New York (R. 782-783)).

Bolich was found guilty together with two co-defendants Henry W. Grunewald and Max Halperin, who were each convicted of conspiracy under 18 U.S.C. § 371 (R. 2-4). Halperin was also convicted on other counts (R. 3-4).

Bolich was sentenced to imprisonment for five years and fined $10,000 on Count 1, and three years imprisonment and fined $5,000 on Count 2, such prison sentences to run concurrently (R. 782-783).

When the case was first before the United States Court of Appeals, that Court rendered a decision unanimously affirming the judgments of conviction as to Bolich and Grunewald (Vol. V App. 288a-316a), except as to the separate fine of $5,000 imposed on Bolich on Count 2 which was set aside, the Court below holding that both Counts 1 and 2 related to the same conspiracy (Vol. V App. 307a-309a; 316a; 358a). Frank, Circuit Judge, dissented solely as to the co-defendant Halperin (Vol. V App. 316a-357a).

On petitions for rehearing filed by Bolich, Grunewald and Halperin, Judge Frank dissented from the denial thereof and rendered an opinion in which he voted to reverse and grant a new trial as to all the defendants (Vol. V App. 380a-393a).

The Indictment

On October 25, 1954, an indictment was returned in which the petitioner, Daniel A. Bolich, former Assistant Commissioner of Internal Revenue, was named as defendant together with seven others—Henry W. Grunewald, Max Steinberg, Harry T. Scherm, Max Halperin, Milton Hoff-

man, Irving Davis and Samuel Schopick (R. 4-16). Upon the Government's motion, a severance of the trial was granted as to the defendants Hoffman, Davis and Schopick (R. 1).

The indictment contained seven counts (R. 4-16).

The First Count on which all three petitioners were convicted, alleged that beginning on or about January 1, 1946, and continuing up to and including the date of the filing of the indictment (October 25, 1954), all defendants, together with others named as co-conspirators but not indicted, conspired in violation of the general conspiracy statute, to defraud the United States in the administration of the revenue laws and to influence witnesses before the Grand Jury in the Eastern District of New York, and before a Congressional Investigating Committee and charged that defendants and co-conspirators would make continuing efforts to avoid detection and prosecution through the use of any means whatsoever and generally obstructing justice (R. 4-8).

It is also alleged that during the course of the conspiracy, Bolich was a Special Agent in Charge of the Intelligence Unit of the Bureau of Internal Revenue in New York City, and Assistant Commissioner of Internal Revenue (R. 5).

In Paragraph 8 it is charged that the defendants and co-conspirators Davis, Hoffman and Schopick would represent that the latter named three individuals and the law firm of Schopick & Davis were specialists in income tax matters and that they had connections and influence enabling them to obtain for taxpayers favorable disposition of tax matters regardless of merits (R. 6-7).

The remaining paragraphs 9 to 14 inclusive alleged that the defendants, Steinberg and Scherm (who were acquitted), would use their positions as employees of the Internal Revenue Bureau to impress upon various persons that the law firm of Schopick & Davis had connec-

tions and could procure favorable disposition of tax matters within the Bureau, regardless of merits (R. 6-7); that the defendants and co-conspirators Davis, Hoffman and Schopick would obtain sums of money to procure corrupt dispositions of then pending tax matters (R. 7); that defendants Bolich, Steinberg and Scherm, as officers and employees of the Bureau, would corruptly render decisions and corruptly handle pending matters (R. 7); and that the defendants and co-conspirators at all times would misrepresent and conceal their acts and purposes of said conspiracy by any means whatsoever and whenever and wherever it was sought by any governmental body to detect and prove the existence of the conspiracy (R. 7-8).

Thirteen overt acts are alleged to have been committed in pursuance of the conspiracy (R. 8-9). Insofar as petitioner Bolich is concerned, the overt act specified is:

> "8. On or about December 20, 1951, within the Southern District of New York, the exact place to the Grand Jury unknown, defendant DANIEL A. BOLICH had a telephone conversation with one Everett Harding" (R. 9).

The first overt act is alleged to have taken place on October 29, 1948, and the last which is numbered 13, is alleged to have occurred on April 7, 1954 (R. 8-9). It is to be noted that the trial judge in charging the jury (R. 738), withdrew from their consideration three overt acts,—those numbered 10, 12 and 13, because there was no evidence of such overt acts which were alleged to have taken place on March 12, 1952, August 26, 1952 and April 7, 1954, respectively.

The Second Count of the indictment charged Bolich, Steinberg and Scherm, as employees of the Internal Revenue Bureau, with conspiracy in violation of 26 U.S.C. 4047 (e) (4) (R. 9-12). The conspiracy alleged is precisely the same as charged in the First Count (R. 4-9). Growing out of the same transaction alleged in the First Count, the

Second Count covers exactly the same period of time involved in the First Count. Defendants Steinberg and Scherm were acquitted (R. 1, 781). As has already been stated, Bolich was also convicted on Count 2. The Court below, holding that both Counts 1 and 2 related to the same conspiracy, set aside the separate fine of $5,000 imposed on Bolich on Count 2 (Vol. V App. 307a-309a; 358a).

The Third Count was dismissed by the trial judge at the close of the government's case upon the ground that prosecution thereof was barred by the Statute of Limitations (R. 569).

The Fourth Count was dismissed before trial (R. 569).

The Fifth, Sixth and Seventh Counts (R. 14-16) were dismissed as against the defendants Grunewald, Bolich, Steinberg and Scherm at the close of the government's case (R. 569).

The Facts Material to the Questions Presented

The record of this joint trial is voluminous extending over 5,400 pages. At the commencement of the trial, the government called eleven witnesses whose testimony taken "subject to connection" is spread over 1,925 pages in four volumes of the trial record (pp. 141-2066). None of these witnesses mentioned the petitioner Bolich, except Louis Berman and Monroe Tobias, who testified to hearsay statements allegedly made to them by Davis concerning the Gotham Beef case to which further reference will be made (R. 141).

The evidence upon which the government relied to establish the offenses charged in the indictment against the defendants was as to each of the defendants different and in a large measure wholly disconnected. The government's case against the petitioner Bolich is based entirely upon circumstantial evidence.

The background of the case—with its mazes and ramifications—are set forth in the brief of the petitioner Grunewald and need not be repeated here. Accordingly to avoid any duplication, we respectfully request that such recital may be deemed incorporated herein, inasmuch as the questions presented by each petitioner, in the main, raise substantially the same issues although framed in a different manner.

The government proceeded upon the theory that the alleged conspiracy involved the corrupt and illegal disposition of two separate tax cases, namely *Pattullo Modes, Inc.*, a dress manufacturing company, and *Gotham Beef Co.*, a meat firm, which were under investigation in 1948 by the Internal Revenue Department (R. 81-83, 309-313, 574-577). Both companies were clients of the law firm of Schopick & Davis (R. 300, 314-318) who were named as defendants in the indictment, together with Milton Hoffman, not a lawyer, but employed by these attorneys as a business "steerer", sharing 47% of their professional income (R. 200, 257-258).

The Gotham Beef Case

The Gotham Beef case was one of the cases which had been assigned for review in April, 1948, to Herman F. Kuehl employed by the Internal Revenue Service, Intelligence Division in New York (R. 274-6). His duties were to prepare reports and recommendations in prosecution and non-prosecution cases in conformity with Bureau policy and the evidence and to hold conferences in the settlement of those cases (R. 276).

The petitioner Bolich was then Special Agent in charge of the Fraud Bureau employing about 150 agents at that time (R. 283). It was his duty as a public officer to receive taxpayers or their attorneys and to refer them to the conferee in charge of any particular investigation. In the latter part of July, 1948, Davis arranged an appointment

to call on Bolich at his office in connection with the Gotham Beef case (R. 316). Davis claimed that he had difficulty in getting Bolich on the telephone, as he was either in conference or busy with Treasury Department officials from Washington (R. 316). Halperin then told him according to Davis' story, that he (Halperin) had spoken to Grunewald, and Grunewald told Halperin that Davis was to continue his efforts to seek an appointment with Bolich (R. 316). Davis called Bolich again and an appointment was made for the following day (R. 316-7).

Thereafter Davis conferred with Bolich at his office, represented himself as the attorney for the Gotham Beef Company and outlined the claims of the Gotham case to him (R. 317). Davis asserted that all of the alleged income from unreported sales of his clients was overceiling money paid out in turn on overceiling costs so that the taxpayers had not profited (R. 317). Bolich thereupon advised him to "submit everything to (the conferee) Mr. Kuehl" (R. 317-8).

Bolich also telephoned Kuehl that Davis was in his office concerning the Gotham Beef case, contending that overceiling purchases and overceiling sales washed out each other and that Davis had checks and invoices to support his clients' claim that there was no tax evasion (R. 276-7).

Kuehl thereafter arranged a conference with Davis for August 16, 1948, which was attended before him by Davis, Special Agent Mullenbach, Louis Berman, one of the members of the Gotham Beef Company and their accountant, Tobias (R. 280).

Kuehl gave the details of the conference and requested Davis' co-operation in submitting net worth statements relating to Philip Berman—one of the principals, as Kuehl had already received such statements with respect to Louis Berman (R. 280-1). After that conference was concluded, Kuehl instructed Special Agent Mullenbach to work with

Tobias (Gotham's accountant) and Davis in order to substantiate their claims or disprove them, and to submit a supplemental report (R. 281).

Subsequently, Mullenbach recommended criminal prosecution in his supplemental report, which Kuehl reversed after conferring with his immediate superior, Mr. Baradel, head of the Conference and Review Section at the Special Agent's office (R. 281-2, 464). Both Kuehl and Baradel agreed that it was "a very weak case" (R. 281-2). Mullenbach conceded that Kuehl and Baradel were more experienced than he and that the only difference that existed between them was whether or not the case was weak (R. 296). He acknowledged that the conference held in August, 1948, and the reinvestigation based on additional evidence were perfectly proper (R. 297-8).

Petitioner Bolich then was no longer Special Agent in charge at the New York office, having left to take up his duties in Washington (R. 284-5, 296).

Kuehl notified Davis on October 28, 1948, that the Gotham Beef case would be closed for civil settlement, with no criminal prosecution, but with the imposition of a civil fraud penalty (R. 282).

Kuehl declared that petitioner Bolich did not at any time request him to do anything improper in the case and that Kuehl's decision was based on his own best judgment uninfluenced by anybody (R. 284). His decision was confirmed by Mr. Baradel, an official of long experience in the Internal Revenue Bureau (R. 284, 464).

The purpose of the alleged conspiracy as testified to by Mr. Tobias—the accountant for the Gotham Beef Company, who was promised immunity from prosecution by the government (R. 163-4)—was stated as follows:

> "Now, the exact terms of the escrow • • • was • • • that until I were to have heard with my own ears

from the special agents' office from a responsible official that there was to be no criminal prosecution in the Gotham matter, * * * the money was not to be released." (R. 165-6)

Pattullo Modes Case

Davis testified that he first consulted a lawyer, Mr. Schwaeber, in September or October, 1947, and later retained the law firm of Saver & Schwaeber as counsel to represent Pattullo Modes, Inc., before the Special Agents' Office of the Internal Revenue Bureau, of which the petitioner Bolich was then the Agent in Charge in New York (R. 305-6). That firm was retained officially on March 31, 1948 (R. 26). Mr. Saver was a former Assistant United States Attorney General and an Assistant United States Attorney in Brooklyn, who had prosecuted tax fraud cases for the Government (R. 213, 470). Unbeknown to these lawyers, Davis contrived a scheme of making a false claim of a voluntary disclosure in which he was aided and abetted by Maurice Smith, the accountant for Pattullo Modes (R. 307-308). The claim was presented and rejected at the Revenue office which handled civil collections and the matter was sent to the Special Agents' office, which was authorized to recommend for or against criminal prosecution (R. 308-309).

Davis went on to say that Mr. Saver told him in March, 1948, that he had discussed the matter of a voluntary disclosure with Mr. Bolich, who replied that he did not believe a voluntary disclosure had been made (R. 308-309). Bolich continued as Agent in Charge of the Fraud Bureau until September 1, 1948, when he went to Washington as Assistant Commissioner of Internal Revenue (R. 275, 464, 513-4).

Davis further testified that Halperin told him to tell Mr. Saver to see Mr. Bolich in Washington (R. 329). Mr. Saver went to Washington and reported back to Davis in November, 1948, that Mr. Bolich said to him:

> "* * * if the taxpayers cooperated fully and developed all of their income that he would recommend that the case be given a non-prosecution consideration (R. 329)."

Mr. Baradel, head of the Conference and Review Section at the Special Agent's office in New York testified that on January 5, 1949, Bolich who was then Assistant Commissioner of Internal Revenue telephoned him regarding the Pattullo Modes case. Baradel advised him that he had ruled against the taxpayers on their claim of voluntary disclosure a couple of months previously (R. 464-5). Bolich agreed that although his (Baradel's) decision was technically correct, he had decided after a conference with the attorneys representing Pattullo Modes (Mr. Saver and Mr. Quinn)* that if the taxpayers gave full co-operation to the agents, the case ought to be closed on a non-prosecution basis (R. 465). Bolich told Baradel he was taking full responsibility for this action and said "let the record show it" (R. 474).

Baradel thereupon advised Clayton, a special agent who had been assigned to investigate the matter (R. 465), of his discussion with Mr. Bolich, told him he could make any kind of recommendation he wished but that he, Baradel, would reverse any recommendation for prosecution in view of this assurance given to the taxpayers by higher authority (R. 478-9).

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* Mr. Quinn became a member of the law firm of Saver & Schwaeber. Mr. Quinn was a former Assistant United States Attorney in Brooklyn, a member of Congress and at the time of the trial was District Attorney of Queens County, New York (R. 471).

Baradel stated that the matter was not to be deemed closed until Squad Leader Dowling returned to the office and the three of them (Baradel, Clayton and Dowling) could then discuss what recommendation would be proper (R. 478-9).

Clayton called Mr. Saver after he had been told that the taxpayers in the Pattullo case were going to co-operate (R. 446). Clayton asked for all of the corporate records, basic records, supporting records, checks, invoices, sales stubs and all of the records relating to the personal finances of the individuals of any kind whatsoever, including the members of their families (R. 446). The prime importance of procuring net worth statements is set forth in detail in the Record at pages 460-462. Clayton was not so much concerned with the corporate records as he was with the individual records of the taxpayers (R. 452).

Instead of the government spending months circularizing customers, banks and brokers, co-operation from the taxpayers supplying information about their personal wealth and their personal dealings with corporate cash, furnished indisputable evidence against them and saved the government a great deal in investigation (R. 452).

On November 19, 1948, Clayton went to the Pattullo office, where Davis informed him that his clients wanted to co-operate fully and would submit net worth statements (R. 453-4).

On January 4, 1949, the taxpayers appeared at the Special Agents' office. Clayton wrote out their statements which they signed under oath (R. 454-5, 462). When they made complete signed confessions, he felt that they had at least reached a degree of co-operation (R. 454-5).

Instead of $100,000 undisclosed income, the figure was increased to a sum in excess of $387,500 resulting from information supplied to the government by the taxpayers or their representatives (R. 458).

At the meeting in Baradel's office on January 10, 1949, Mr. Saver called attention to Bolich's promise and after Baradel learned that full co-operation has been given by the taxpayers, he announced that he would close the case against them without prosecution, but with a 50 per cent penalty (R. 331, 467).

Baradel further declared that he had determined definitely against prosecution and had reached that decision honestly in the exercise of his best judgment and discretion (R. 480-1, 485-7).

The purpose of the alleged conspiracy in the *Pattullo* case was thus stated by Mr. Marks, one of the principals connected with that concern, who was named as co-conspirator, but not indicted (R. 4):

> "He [Davis] says all he could promise us that there would be a memorandum put into our file that the case was to be settled on a civil basis" (R. 32).

The Termination of the Alleged Conspiracies in the Pattullo and Gotham Beef Cases

It is clear from the foregoing outline of the facts that the object and purposes of the alleged conspiracy ended in the *Pattullo* case in January, 1949, when the official announcement was made by Special Agent Baradel in the New York Fraud Bureau that the case against the Pattullo principals would be closed against them without criminal prosecution, but with the imposition of a 50 per cent civil penalty (R. 32, 33, 74, 226-230, 331, 332-3, 467).

In the *Gotham Beef* case, the alleged conspiracy also terminated when its objects were fully achieved in October, 1948, upon the official ruling made by Mr. Kuehl in the Special Agent's Office that the case would be closed for civil settlement, with no criminal prosecution, but with the imposition of a civil fraud penalty (R. 147, 148, 153-4, 165-6, 185, 325-6, 282).

The indictment herein was filed October 25, 1954 (R. 4). The Statute of Limitations was, therefore, a complete defense to the prosecution under U.S.C. § 371 and an insuperable obstacle in the government's way, because the three-year period under the general conspiracy statute barred any prosecution. To save the case from the bar of the statute, the prosecution ingeniously charged a general and continuing conspiracy including a conspiracy to conceal and to subvert witnesses before a Congressional Investigating Committee (in 1951) and before a Grand Jury (in 1952) (R. 4-9).

The Government's Concession Upon the Trial

During the argument on the motions for judgment of acquittal made on behalf of all defendants, the Government conceded that no overt acts other than concealment had occurred within the three year limitation period (R. 565).

In connection with the alleged continuing conspiracy to conceal and its effect on the Statute of Limitations, the trial Court stressed the point that this was an important element of the first count of the indictment, inasmuch as the Statute of Limitations on the charge of criminal conspiracy is three years and

> "• • • unless the conspiracy was continuing to a period within three years prior to the date of the indictment, October 25, 1954, and some overt act was performed within that three year period, the crime, if any, alleged in the first count of the indictment would be outlawed. It is the contention of the government that the conspiracy did not end when the taxpayers were advised that there would be no criminal prosecution recommended by the Special Agent's office, but that an integral part of the entire conspiracy was an agreement to conceal the acts of the conspirators and that when thereafter an investigation was started by Con-

gress and by the Grand Jury in the Eastern District of New York, the conspirators performed overt acts in pursuance of the original conspiracy designed to conceal the true facts; and that these acts occurred within three years prior to the date of the indictment * * *" (R. 732).

The Overt Act Charged Against Bolich Occurring After October, 1951—Within the Period of the Statute of Limitations

Insofar as petitioner Bolich is concerned, the sole overt act with which he is charged in the indictment, related to a telephone conversation had on or about December 20, 1951, with one Everett Harding (R. 9).

Harding, Assistant Manager of the Hotel Washington, Washington, D. C. testified, among other matters, that in the summer of 1950, Bolich requested his hotel bills for approximately a year back so that he might review them (R. 949). About a month or two later, Harding handed a compiled record of bills to Bolich, which did not include voucher records such as long distance telephones and restaurant charges (R. 950). Harding claimed that the records were never returned to him (R. 950). In December, 1951, when the King Committee of the House of Representatives subpoenaed these records, the hotel management requested Bolich to return them (R. 950-2). On December 20, 1951, Bolich telephoned Harding and we quote from the record:

"Q. What did he say? A. The substance of the call was that Mr. Bolich said he had not received the records—let us see now, it has been so long ago, sir, I am sorry, I will do my best—he had not received the records, that he had been in bed with a bad heart * * *" (R. 952).

Harding had no clear recollection of this conversation and sought to refresh his memory by the use of a memorandum (R. 952-3). He then modified his testimony as follows:

> "Mr. Bolich said he did not receive the records and later in his conversation said he simply did not remember ever having received them; that if he had, he knew he had not taken them from the office or away from the office; that it could have been that he might have laid them on Mr. Rhodes' desk [Executive Assistant Manager of the hotel] or something of the sort there, that he knew he had never taken them away from the office" (R. 953).

Bolich told him there must be other records and if the hotel had its voucher records, they could reconstruct their bills from that (R. 954).

On cross-examination, Harding stated that all voucher records were destroyed by the hotel every two years, and larger bills were kept five years (R. 796). These records were discarded in the usual course of business and was not done at Bolich's request (R. 795).

Mr. Harding at first testified that he did not know whether or not Bolich was a resident of the Washington Hotel from June 22, 1949 to June 22, 1950 and could not tell unless he had the records to show such occupancy (R. 948). When Mr. Harding resumed his direct testimony the next day, he declared on the question of Bolich's occupancy in flat contradiction of his previous testimony as follows:

> "Q. Mr. Harding, when court adjourned last night you had just testified that you had handed Daniel Bolich hotel records for his occupancy of your hotel from June of 1949 to June of 1950 and that when you had received the subpoena from the King Committee

for these records you had requested them of him? A. That is right.

Q. Now, limiting yourself to that period from June 1949 to June 1950, do you know whether Mr. Bolich resided in your hotel during that time? A. Yes, he did.

Q. Where in the hotel did he reside during that period? A. Partly in Suite 319, 320 and 321, and then changed some time during that period to 419, 420 and 421" (R. 954-955).

In the government's brief in opposition to the petition for certiorari herein it is stated at page 15 that:

"It was during the period covered by the missing records that Bolich was living in the Grunewald suite which was carried in the name of Harry Woodring" (G. 172).

Mr. Harding produced the registration card in the name of Harry Woodring for Suite 319, 320 and 321, which was rented to him on a permanent guest basis (R. 499; Certified Record of proceedings below, pp. 3225-6). Mr. Woodring was formerly Secretary of War under President Roosevelt (R. 508). The witness produced hotel bills in the name of Mr. and Mrs. D. A. Bolich for the same suite (R. 500). Grunewald also used part of the suite which he maintained as an office (R. 527-8). Grunewald lived, however, at the Westchester Apartments in the suburbs of Washington (R. 546).

The trial record is clear that Bolich's occupancy at the hotel was known and recorded at all times and was never concealed (Government's Exhibit 62; Certified Record of proceedings below, pp. 3159-3160). It is apparent from this exhibit that the so-called "missing records" consisted of bills rendered to Bolich from June, 1949 to June, 1950, for hotel service and incidentals such as valet services,

laundry and similar items, but did not include such voucher records as long-distance telephones and restaurant charges (R. 949-950).

The Variance Between the Indictment and the Proof of Multiple Conspiracies

Although the indictment charged a single conspiracy, the proof established a series of separate and disconnected conspiracies.

There was no evidence that petitioner Bolich was a party to the Davis and Smith conspiracy (R. 307-308), which related to Smith's perjured affidavit of voluntary disclosure presented by him while acting as the accountant for Pattullo Modes.

There was no evidence connecting Bolich with the charge alleged in Paragraph 9 of Count 1 of the indictment (R. 7) that the defendants Steinberg and Scherm would use their positions as employees of the Internal Revenue Bureau to impress various persons with the connections and ability of the law firm of Schopick & Davis to procure favorable disposition of tax matters within the Bureau regardless of merits. Defendants Steinberg and Scherm were acquitted on all counts (R. 764-5). Because Steinberg and Scherm were named as defendants, the prosecution presented evidence—in no manner connected with Bolich—relating to Hoffman's contacts and alleged conversations with Steinberg (R. 206-207; 208-211; 233-236; 240-246) and of alleged negotiations of Davis with Scherm for a $50,000 payment to Scherm (R. 334-338).

Scherm testified in his own defense that he never even spoke to Bolich (R. 599). Evidence which completely failed to connect Bolich therewith was also received as to Hoffman's maneuvers to obtain the Pattullo Modes as a client for Schopick & Davis (R. 206-7; 210-211).

There was no evidence that Bolich was in any way involved with the extortionate demands of Hoffman and Davis upon the Pattullo principals to procure their tax case (R. 23).

Bolich was not in any way connected with the alleged arrangement of Davis and Schwaeber and the Pattullo principals to pay an unrecorded cash fee to Schwaeber (R. 334-4).

Bolich was not in any manner connected with any of the substantive acts alleged in the fifth, sixth and seventh counts which charged that all of the eight defendants did unlawfully endeavor in the month of March, 1952, to influence certain named witnesses to give false testimony and to obstruct justice concerning certain income tax fraud investigations being conducted by the Brooklyn Grand Jury (R. 14-16). Indeed, Bolich, Grunewald, Steinberg and Scherm were acquitted of these substantive charges by direction of the trial Court at the close of the government's case (R. 569).

Defense Motions

At the end of the government's case, the petitioners separately moved for judgment of acquittal on various grounds, particularly contending that the charge of conspiracy to conceal, coupled with the fact that overt acts were alleged to have taken place in 1951 and 1952, constituted an ingenious device to extend the Statute of Limitations which was a bar to the prosecution of the conspiracy charges (R. 546-565). The motions were argued at great length by respective counsel and included motions to strike out extraneous matter as against the petitioners (R. 546-7, 551-4, 799-801), or to dismiss for variance (R. 548-549) or to separate the issues (R. 557-559). The motions directed to counts 1 and 2 of the indictment were denied (R. 569). All other motions to strike out testimony were denied (R. 569).

The motions were renewed at the close of the entire case (R. 710-712, 799-801). Upon denial of the motions, exceptions were taken which inured to the benefit of all defendants (R. 711). Substantially the same grounds were again advanced in support of motions made by respective counsel to set aside the verdict and for a new trial (R. 765-6, 778-780, 807-809).

The Court below in its original decision unanimously affirmed the judgments of conviction as to the petitioner Bolich and co-defendant Grunewald. Judge Frank dissented solely as to the defendant Halperin and voted to grant him a new trial on the ground of the invasion of his constitutional rights, coupled with the trial Court's instruction that the jury might consider his assertion of his constitutional privilege as affecting his credibility. On petitions for rehearing, Judge Frank dissented as to all defendants and voted to grant them a new trial because of a serious error in the trial judge's charge on the issue of the Statute of Limitations (Vol. V App. Majority Opinion, pp. 288a-316a; Original Dissenting Opinion, pp. 316a-357a; Dissenting Opinion on Denial of Petitions for Rehearing, pp. 380a-393a).

Summary of Argument

The issues involved in this case relate to the three year Statute of Limitations applicable to the general conspiracy count; to the doctrine of multiple conspiracies; and the propriety of the trial Court's ruling and instruction to the jury that they might consider petitioner Halperin's claim of constitutional privilege before a Grand Jury as adversely affecting his credibility upon the trial when he gave evidence as the only witness for the defense.

(1) All parties agree that the three-year Statute of Limitations is applicable. The indictment herein was re-

turned on October 25, 1954. The crucial date, therefore, is October 25, 1951. The theory of the prosecution was that the alleged conspiracy involved the corrupt and unlawful disposition of two separate tax cases, namely *Pattullo Modes, Inc.* and *Gotham Beef Co.*, which were under investigation in 1948 by the Internal Revenue Department. The purpose or object of the conspiracy as testified to by the government's witnesses was to obtain rulings from government officials that their tax cases would be closed without criminal prosecution against them.

The objective of the alleged conspiracy was achieved when, in January, 1949, the desired ruling was made in the *Pattullo* case. The *Gotham* case was closed previously in October, 1948, when an official announcement was made that there would be no criminal prosecution.

The indictment charged as part of the conspiracy allegedly starting in 1946, a continuing agreement to conceal the acts done pursuant thereto and to influence witnesses in 1952 before a Brooklyn Grand Jury and also a Congressional Committee apparently in 1951. There was no conceivable basis for accusing the defendants with such a conspiracy claimed to have been formed in 1946, as no one could have known at the time of the formation thereof that there would be a Congressional investigation in 1951 and a Grand Jury inquiry in 1952.

Except for the concealment feature, prosecution would have been barred by the defense of the Statute of Limitations.

The Government conceded upon the trial that the only overt acts alleged and proved to have been committed within the three-year period preceding the filing of the indictment were acts of concealment.

It is contended that the acts of concealment were individual and independent acts of one or more of the conspirators to cover up their tracks to avoid detection and

punishment. It is further contended that attempts to cover up their wrong doing after the accomplishment of the conspiracy cannot be overt acts done to effect the object of the conspiracy. The record is barren of any proof that these acts were part of the main conspiracy to defraud the government and petitioners contend that an agreement to conceal never was an objective or part of the main conspiracy.

The decision of the Court below is squarely in conflict with the principles laid down in *Krulewitch* v. *United States*, 336 U. S. 440, and *Lutwak* v. *United States*, 344 U. S. 604, which preclude implying an extension of the conspiracy, because a contrary rule would result in an indeterminate extension of the Statute of Limitations.

(2) More than one conspiracy was proved in violation of the principles in *Kotteakos* v. *United States*, 328 U. S. 750, because each defendant in this case had a substantial right not to be tried *en masse* for a conglomeration of distinct and separate offenses committed by others.

(3) The petitioner Halperin presents in his summary and argument the question involved relating to Halperin's claim of constitutional privilege and the trial judge's prejudicial instruction to the jury affecting not only Halperin—who testified for the defense—but also the petitioners Bolich and Grunewald.

Argument

POINT I

(Question Presented No. 1.)*

The three year Statute of Limitations applicable to the charge of conspiracy, barred conviction of the petitioner Bolich inasmuch as the objective of the alleged conspiracy had been achieved by January, 1949—more than five years before the date of the indictment which was filed on October 25, 1954.

Statutes of limitations in criminal cases differ from those in civil cases, in that in civil cases they are statutes of repose, while in criminal cases, they create a bar to the prosecution (15 Am. Jur., *Criminal Law*, §342, p. 32; 1 Wharton, *Crim. Proc.*, 10th ed., § 367, p. 415).

Statutes limiting the time for instituting criminal prosecutions should be liberally construed in favor of the defendant, and exceptions from their benefits are to be construed strictly against the prosecution (1 Wharton, *Cr. Law*, 7th ed., § 444a). Such liberality of construction belongs to all acts of amnesty and grace, because the very existence of the Statute is a recognition and notification by the very Legislature of the fact that time, while it gradually wears out proofs of innocence, has assigned to it fixed and positive periods in which it destroys proofs of guilt (*Moore* v. *State*, 43 N.J.L. 203; *People* v. *Buckner*, 281 Ill. 340).

* In the *Grunewald* petition for certiorari (No. 183), Question Nos. 1, 2, 3, 4, and in the *Halperin* petition (No. 184), Question Nos. 8, 9, represent different aspects of the same point. The argument on this question is dealt with so comprehensively by counsel for the petitioner Grunewald, that we respectfully urge that it be considered with the same force and effect as if restated here, since it is equally applicable to the petitioner Bolich.

In the majority opinion below, it is stated on the issue of the Statute of Limitations, in part, as follows:

> "Each of the appellants argues that, even if a conspiracy is proved, prosecution is barred by the Statute of Limitations. This is an interesting and important question, seemingly one of first impression. As all parties agree that the three-year period prescribed by 18 U.S.C. § 3282 is applicable, the crucial date is October 25, 1951. Bolich, Grunewald and Halperin earnestly press their view that the Statute of Limitations began to run no later than January 10, 1949, when the official ruling was made that there would be no criminal prosecution in the Pattullo Modes case. * * *" (Vol. V App. 299a).

The scope of an alleged criminal conspiracy must be gathered from the testimony and not from the averments of the indictment (*Terry* v. *United States* (C.C.A. 9) 7 F. 2d 28, 29; *Ford* v. *United States* (C.C.A. 9) 10 F. 2d 339, 348, affirmed 273 U. S. 593; *Marino* v. *United States* (C.C.A. 9) 91 F. 2d 691, 699).

The government's pattern of proof so far as petitioner Bolich is concerned related to two separate tax cases, namely *Pattullo Modes, Inc.* and *Gotham Beef Company.*

In spite of the immense mass of accusations and hearsay testimony stemming primarily from self-confessed accomplices and co-conspirators who were promised immunity from prosecution—all of which was thrown confusedly before the jury in a trial of seven weeks' duration—a scrutiny of the record demonstrates that the conspiracy if any existed, had ended upon the accomplishment of the object thereof, more than three years before the return of the indictment.

We have already set forth the specific evidence in the record as to the purpose or object of the alleged con-

spiracy as testified to by the taxpayers themselves in the *Pattullo* and *Gotham Beef* cases (see, *supra*, 10-11, 14). The official ruling that there would be no criminal prosecution in the *Pattullo* case was made January 10, 1949 (R. 37, 331-3). In the *Gotham Beef* case, the official announcement that the case would be closed without criminal prosecution was made in October, 1948 (R. 147, 148, 153-4, 165-6, 185, 282, 325-6).

The money was allegedly released by the taxpayers in the *Pattullo* case on or about January 12 or 13, 1949 (R. 331-3), and in the *Gotham* case in October, 1948 (R. 167, 169).

In the light of the chronology of events disclosed by the record, it is clear that the indictment returned on October 25, 1954, charging an agreement to conceal as part of the original conspiracy, is an adroit, camouflaged composition designed to extend the Statute of Limitations which had run in January, 1952, three years after January 10, 1949 when the objective of the conspiracy had been attained.

In the first place, there was no evidence whatever to sustain the charge in the indictment that as part of the alleged conspiracy starting in 1946, there was also an agreement to influence witnesses in 1952 before the Grand Jury in the Eastern District of New York (R. 149-50, 170-2) and before a Congressional Investigating Committee apparently in 1951 (R. 38-9, 149, 170, 354-5). Such charge is beyond the bounds of reason because the petitioners could not possibly have known at the time of the alleged conspiracy that there would be such Grand Jury and Congressional investigations three to three and one-half years later.

The case at bar cannot be distinguished in any essential respect from that of *Krulewitch* v. *United States*, 336 U. S. 440 and *Lutwak* v. *United States*, 344 U. S. 604. All

the petitioners maintain that the decision of the Court below is in clear conflict with the *Krulewitch* and *Lutwak* cases, which support the contentions of the petitioners. This question is elaborately and exhaustively considered in the briefs of petitioners Grunewald and Halperin. It would serve no useful purpose to repeat the same arguments therein contained, which we adopt in all respects and incorporate by reference herein. We do, however, desire to add what was said by Mr. Justice Jackson, in his concurring opinion in the *Krulewitch* case, 336 U. S. 440, 445-6, as singularly appropriate here:

> "This case illustrates a present drift in the federal law of conspiracy which warrants some further comment because it is characteristic of the long evolution of that elastic, sprawling and pervasive offense. Its history exemplifies the 'tendency of a principle to expand itself to the limit of its logic.' * * * The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, * * * suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice."

POINT II

(Question Presented No. 2.)*

Multiple conspiracies were established by the evidence, rather than a single general conspiracy, to the substantial prejudice of the rights of the petitioner Bolich.

The trial herein was "conducted * * * on the assumption that it was immaterial whether the proof showed

* In the *Halperin* petition for certiorari (No. 184), Question No. 9, involves the same point.

one conspiracy with which all of the defendants were connected, or separate conspiracies with which some, but not all, of them were" (*Brooks* v. *United States,* 164 F. 2d 142, 143 (C.C.A. 5).

The first count of the indictment alleges a single, all-inclusive conspiracy from 1946 to 1954. The proof, however, does not conform to that charge. In our statement of the case, we set forth at pages 19-20, the particulars which demonstrate that the proof established a series of separate and disconnected conspiracies, which affected the substantial rights of the petitioner.

Upon the trial, petitioner Bolich joined in the motions seeking a dismissal of the first count upon the ground of a fatal variance between the pleadings and the proof (R. 548-9).

The case at bar clearly falls within the principle of *Kotteakos* v. *United States,* 328 U. S. 750, where the indictment alleged a single conspiracy and the evidence proved multiple conspiracies by separate groups of defendants which had no connection with each other except that all utilized one Brown as a broker to handle fraudulent applications for loans under the National Housing Act. The judgments were reversed because the trial Court's instructions confused the common purpose of a single enterprise with the purposes of numerous separate conspiracies; permitted the dangers of transference of guilt by the jury from one to another across the line separating conspiracies particularly in view of the Court's charge that the statement and overt acts of *any* defendant found to be a conspirator could be considered against *all* defendants. This Court held that each defendant had a "substantial right" not to be tried *en masse* for a conglomeration of distinct and separate offenses committed by others.

There was not the slightest justification in respect to petitioner, Bolich for adding a charge that he conspired

to influence certain named witnesses in March 1952. The Court directed a judgment of acquittal at the close of the governments' case on the substantive counts alleged in the fifth, sixth and seventh counts charging such offenses against him and likewise directed the acquittal of the petitioner Grunewald (R. 569).

We have marshaled the mass of unrelated and highly prejudicial evidence at pages 19-20 of this brief by which the prosecution sought "* * * to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all-comprehensive indictments that they can be avoided." *United States* v. *Falcone*, 109 F. 2d 579-581 (C.C.A. 2).

This case points up vividly the evils of the single count conspiracy indictment discussed by Mr. Justice Jackson in his concurring opinion in *Krulewitch* v. *United States*, *supra*, 306 U. S. 440, 445-6.*

In *United States* v. *Siebricht*, 59 F. 2d 976 (C.C.A. 2), the indictment charged a single conspiracy, but the proof indicated two separate conspiracies. Even assuming that the indictment could be read as setting forth two conspiracies which might be properly joined, the question of

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* The Court below in its majority opinion (Vol. V, App. 303a) stated:

> "The record contains ample proof of efforts by the conspirators to forestall suspicion and wipe out traces of their operations and these efforts developed later and in 1951 and 1952 into an intensified campaign of concealment, the details of which will be referred to briefly in connection with the charges against Halperin in Counts 5, 6 and 7."

There is not a particle of evidence which in any way links petitioners Bolich and Grunewald with the charges in Counts 5, 6 and 7, on which they were acquitted by direction of the trial court (R. 569).

guilt in respect to the first conspiracy could not be submitted because that cause of action was barred by the Statute of Limitations. The trial Judge submitted the case only upon the theory that the jury could convict if it found a single conspiracy, and charged that to find the defendant guilty with respect to the second transaction it must find a continuing conspiracy throughout.

Judge Augustus N. Hand, writing for the Court, in reversing the judgment of conviction, held that proof of two conspiracies, one of which was barred by the Statute of Limitations constituted a fatal variance with the indictment alleging a single conspiracy. (See also Judge Frank's dissenting opinion in the case at bar on the same subject (Vol. V App. 388a-389a).)

POINT III

(Question Presented No. 6.)*

The trial Court committed prejudicial error in permitting the government to elicit from the defendant Halperin upon his cross examination that he had invoked the Fifth Amendment at a Grand Jury hearing and the trial Court charged the jury that they might consider Halperin's claim of constitutional privilege as adversely affecting his credibility.

We join with the petitioner Grunewald in relying upon the brief filed on behalf of petitioner Halperin on this subject.

The invasion of the petitioner Halperin's constitutional rights, coupled with the trial judge's ruling and instruc-

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* In the *Grunewald* petition, the same question is substantially involved in No. 6. In the *Halperin* petition, various aspects of the question are involved in Nos. 1, 2, 3, 4, 5, 6 and separate phases of the question are involved in Nos. 7, 11.

tion that the jury might consider his assertion of his constitutional privilege as affecting the credibility of his other testimony at the trial, necessarily affected and prejudiced the rights of petitioner Bolich as well as Grunewald, because Halperin was the only witness for this group of defendants and testified to vital and material facts which supported not only his claim of innocence, but the innocence of the petitioners Bolich and Grunewald (R. 684-687, 690-693, 701-703, 748, 756-758).

If Judge Frank is right in his original dissenting opinion (Vol. V App. 316a-357a), in which he has given this constitutional question so exhaustive an examination, then the conclusion is inescapable that the challenged ruling and instruction were erroneous and rendered impossible a fair and objective consideration of the evidence against petitioner Bolich by the jury. The jury's verdict could readily have been influenced by this serious error. The record shows that all counsel vigorously and persistently protested the trial judge's ruling and instruction on this subject and moved for a mistrial (R. 684-687, 690-693, 701-703, 748, 756-758).

We submit that it is highly probable that the challenged ruling and instruction relating to the credibility of Halperin may have turned the wavering scales not only against him but the petitioners Bolich and Grunewald as well. We base this statement on Judge Frank's observation in the course of his first dissenting opinion (Vol. V, App. 329a), that: "The evidence against Halperin is not overwhelming. The jury could reasonably have acquitted him." This applies with equal force to the petitioner Bolich, for the jury might well have come to a different conclusion if the Court had not charged that Halperin's claim of constitutional privilege—the only witness for the defense—might discredit his trial testimony.

CONCLUSION

The judgment should be reversed and the indictment dismissed, or in the alternative, a new trial granted.

Respectfully submitted,

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